TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 83.

JOSEFA DIANA MARTINEZ, JULIO N. CHARDON, CARLOS CABRERA, AND TOMAS TORRES, APPELLANTS,

vs.

LA ASOCIACION DE SEÑORAS DAMAS DEL SANTOS ASILO DE PONCE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED MAY 14, 1907.

(20,714.)

(20,714.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 312.

JOSEFA DIANA MARTINEZ, JULIO N. CHARDON, CARLOS CABRERA, AND TOMAS TORRES, APPELLANTS,

vs.

LA ASOCIACION DE SENORAS DAMAS DEL SANTOS ASILO DE PONCE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Exhibit A—Will of Juan B. Silva in Spanish	25	13
Appearance for defendants	31	17
Demurrer to bill	32	18
Demurrer set for argument	34	19
Order on demurrer	35	19
Plea	36	20
Plea set for argument	38	21
Plea overruled	38	21
Answer	39	22
Replication	52	28
Argument and submission	53	29
Order for decree for complainant	53	29
Opinion	54	29
Final decree	74	41

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	Original.	Print.
Petition for appeal	81	45
Assignment of errors	82	45
Order fixing amount of bond, &c	85	47
Order approving bond and allowing appeal	86	47
Supersedeas bond	86	47
Statement of facts	88	49
Transation of last will and testament of Juan B. Silva	89	49
Præcipe for transcript	100	55
Clerk's certificate	101	56
Citation	102	56
Marshal's return	103	57

1 At a stated term of the District Court of the United States for Porto Rico, begun and held at the city of San Juan, in the said district, on the eighth day of October, in the year of our Lord one thousand nine hundred and six, and in the one hundred and thirty first year of the Independence of the United States of America.

Present: The Hon. Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a final decree on the 25th day of February, 1907, in the following cause, to wit:

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE, Complainant,

vs.

JOSEFA DIANA Y MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS TORRES, Defendants.

Be it remembered that heretofore, to wit, on July 7, 1905, came said complainant by her solicitors, Pettingill & Leake and Angel Acosta Quintero and filed their bill of complaint which is as follows, to wit:

Bill of Complaint.

To the Honorable Chas. F. McKenna, Judge of the Court aforesaid, Sitting in Chancery:

2 Asociación de Señoras Damas del Santo Asilo de Ponce, a charitable corporation organized and existing under the laws of the Kingdom of Spain, brings this its bill of complaint against Josefa Diana y Martínez, Julio N. Chardón, Carlos Cabrera and Tomás Torres, citizens of Porto Rico, defendants and thereupon your orator complains and says:

First. That on the 17th day of December 1873, Juan Bautista Silva, who then lived in the jurisdiction of Santa Isabel, Porto Rico, and who had accumulated during his life time and then owned a large amount of real and personal property including that hereinafter described, and who remained unmarried and without legal heirs up to the day of his death, made and executed his last will and testament before the Notary Don Francisco Parra.

That in said last will and testament he declared, among other things, that he desired his estate to be preserved intact, and after making certain bequests, devised all his property, both real and personal, to his good friend José Apolinario Laboy, as his sole voluntary heir, to be held and possessed by him during his life time upon certain conditions expressed in said last will and testament as follows:

"*First.* That the net income of said property, after satisfying the municipal and other taxes which should be legally imposed, shall be divided in two equal parts, one for his heir, Laboy, as a proper recompense for the careful administration and guardianship of the

interests of said estate, and the other half for the benefit of the sick poor of the Santo Asilo de Caridad de las Damas de Ponce, the liquidation of which income, and the delivery of the latter part to be made at the end of each year by the said heir, without outside intervention of any kind, in compliance with the dictates of
3 his conscience, and because the income from properties of the kind which he devised depends upon whether the seasons are favorable and the rains in that vicinity sufficient.

Second. That the special object of the testator being the preservation of his estate without division, said estate should pass, upon the death of said José Apolinario Laboy into the custody and possession of such person as should be named in the last will and testament of said Laboy, with the same powers and for the same object which said testator had expressed in his said will; and this power of substitution which said testator gave to said Laboy should be transmitted successively by will or other method of equal effect by each person so named to discharge said trust.

Third. That if on account of this requirement of substitution not being opportunely fulfilled according to the wish of the testator, or by reason of claims interposed by any relative or stranger, or by reason of any other cuase, motive or claim, it should be desired that said inheritance should be made or considered vacant or undisposed of according to said will, it was the will of the testator that in such case said estate should pass at the death of said José Apolinario Laboy to said Santo Asilo de Caridad de las Damas de Ponce as the heir of said testator by substitution."

All of which will more fully appear from a true and correct copy of the will herewith filed marked "Exhibit A."

Second. Your orator further represents that the said Juan Bautista Silva died on the 15th day of May, 1875, without having revoked said last will and testament or made any other modifying or changing the same in any respect, and that upon said death the said Juan Apolinario Laboy entered into the custody and possession of all and si-gular the goods and property belonging to the said Juan Bautista Silva at the time of his death in accordance with the terms of his last will and testament as above set forth; that said Laboy carried out the provisions of said last will and testament touching the special bequests therein provided for and continued during
4 his life time to administer the said estate in all respects according to the provisions of the said last will and testament, delivering to your orator the half of all the net income derived by him from said estate.

Third. That the goods and property left by the said Juan Bautista Silva at his death, and passing into the possession of said Juan Apolinario Laboy under the terms of said will, were certain personal property and tracts of real estate, the latter being described as follows:

"A. The farm upon which the testator lives, situated in the barrio of Boca, Santa Isabel, known by the name of "Mejías," containing two hundred and eighteen and a half cuerdas, purchased from Don Federico Capó and wife, in 1864, to which said testator had added

adjacent parcels from time to time until said farm included four hundred and fifty cuerdas.

B. Another parcel of land in the same barrio and jurisdiction, containing an area of one hundred and twenty six cuerdas.

C. Another parcel of land in the same jurisdiction of Santa Isabel in the place called "Coto" containing fifty and one half cuerdas of land.

D. A parcel of land in the barrio of Capitanejos, jurisdiction of Juana Díaz, containing one acre and a half, which is bounded on the south by the carretera which leads *of* Santa Isabel and on the remaining sides by land of the Sucesión of Don Fernando Labastide, which small parcel is now leased to the owners of the hacienda "Bocachica."

Fourth. That among the bequests made by said Juan Bautista Silva in his said last will and testament, was a bequest of fifty acres of land forming a part of the above described farm No. "A," containing four hundred and fifty cuerdas, to two daughters of a woman who had formerly been the slave of the testator, and, the said
5 fifty acres so bequeathed being deducted the remainder of said property numbered "A" contained an area of four hundred cuerdas, which is the same property, and with the same boundaries hereinafter to be described, as included in the properties to which the defendant Josefa Diana y Martinez fraudulently obtained a title of possession.

Fifth. That shortly after the entry of said Juan Apolinario Laboy into the possession and control of the estate so left to said Juan Bautista Silva, as aforesaid, to wit, about the 30th day of September, 1875, the said Juan Apolinario Laboy, in further compliance with the said last will and testament of his said testator, made and executed his last will and testament before the same Notary, Francisco Parra, wherein said Laboy stated that having come into possession of the estate left by the said Silva, he, by said Notarial act, proceeded to comply with the conditions stated in the last will and testament of said Silva, by naming as the heir of said Silva in substitution for himself, his wife Dominga Fernandez y Verdés, or in case of her death before his, or other legal impossibility he named in her stead his foster-son José Laboy, thereby conferring upon said substitute heir the same ample powers which said Silva had conceded to him by his last will and testament hereinbefore referred to.

Sixth. That upon the death of said Juan Apolinario Laboy, which occurred in the month of —— A. D. 188–, the said Dominga Fernández y Verdés, who was his widow and the person named in his will as the person selected to assume in his stead the duties fixed by said will of Juan Bautista Silva at once entered upon the
6 possession and administration of the said estate of Silva and continued to possess and administer said estate and to deliver to your orator, in accordance with the terms of said last will of said Silva, the half of the net income of said estate until the 15th day of January, 1891, on which date she died. But, said Dominga Fernandez y Verdés had failed to comply with the provisions of said last will and testament of said Silva whereby she was required

upon taking possession of said estate to execute a testament naming the person who should succeed her in the performance of the duties specified in said last will of said Silva, and the said Dominga Fernández y Verdés, so died, as aforesaid, without having made or executed any last will or testament for any purpose whatsoever.

Seventh. That by the said failure of the said Dominga Fernández y Verdés to execute a last will and testament naming such successor in the management and possesion of the estate of said Juan Bautista Silva, the condition of said will whereby such persons were successively to be made for the performance of said duties was violated and became of no further force or effect, but in place thereof the third condition of said will hereinbefore recited became operative and effective whereby it was provided that in such case the whole of said estate of said Juan Bautista Silva should pass to your orator for the benefit of the indigent poor under its care. And that from the date last aforesaid, your orator became entitled, under the terms of said will of said Juan Bautista Silva to the possession control and full dominion title of all the estate then remaining of what had been left by said Silva at his death including the real estate here-
7 inbefore described save and except the fifty acres especially bequ-athed by said Silva as aforesaid.

Eighth. That notwithstanding the limitations upon the power of said Juan Apolinario Laboy to name a single person in his last will and testament as his substitute under the terms of the last will of said Silva, and notwithstanding that by the entrance of his said wife, Dominga Fernandez y Verdés upon the performance of said duties as his substitute named in his said will, his power of appointment became exhausted and the appointment of his said foster-child, José Laboy, y Fernandez, in the alternative in case his said wife for any reason did not qualify became *functus oficio,* the said José Laboy y Fernandez claiming and pretending to act under and by virtue of the alternative appointment aforesaid, wrongfully and fraudulently took possession and control of the said estate of said Silva and continued to control and manage the same from the date of the death of said Dominga Fernández y Verdés up to the date of his death, which occurred on the 13th day of November, 1903.

Ninth. That the said José Laboy Fernandez, after taking possession of said estate, as aforesaid, and in further pretended pursuance of the provisions of said last will and testament of said Silva, made and executed on the 4th day of October, 1893, a public document called a "substitution of heirship," wherein he recited that having taken possession of said estate in succession to Dominga Fernandez y Verdés, he must comply with the provisions of the will of said Silva as to the appointment of his successor or as substituted heir of said Silva, and for that purpose named his legitimate wife the defendant, Josefa Diana y Martínez, attempting to
8 confer upon her the same powers which he claimed to have been conferred upon him in accordance with the said last will of said Silva; and on the 11th day of November, 1903, the said

José Laboy Fernandez made and executed his last will and testament before the Notary, Angel Acosta Quintero, whereby he made testamentary disposition of certain individual property not connected with said estate of said Silva, and further declared that all of the property in his possession or under his control belonged to the estate of said Juan Bautista Silva, of which he claimed to be the only representative, and made reference to the public document hereinbefore referred to as a substitution of heirship, and attempted to ratify and confirm the same in said last will and testament.

Tenth. That upon the death of said José Laboy Fernandez on the date aforesaid, the defendant, Josefa Diana Martinez, claiming and pretending to act under the power attempted to be conferred by the public document and last will and testament of her husband aforesaid, entered upon the control and management of said estate of said Juan Bautista Silva, although such act and claim on the part of said defendant was wholly fraudulent and unwarranted, and has continued in possession and control of the same up to the present time, except to the extent and in the manner hereinafter explained. But your orator alleges that far from recognizing the rights of your orator to the said estate and the possession, control and dominion thereof, as hereinbefore alleged, or even to the half of the net income therefrom, as accounted for by her predecessors,

has refused to recognize any rights of your orator in said
9 estate, has attempted to execute leases of portions of said property for long terms of years for inadequate rentals, has fraudulently obtained by judicial process a possessory title to nearly all of the real estate belonging to said estate of Silva, and has used every effort and means to appropriate to herself the assets of said estate which legally belonged under the conditions of said last will and testament of said Juan Bautista Silva to your orator; all which wrongful acts and doings are contrary to equity and good conscience, as will be hereinafter more specifically set forth.

Eleventh. That on the first day of February, 1894, the said José Laboy y Fernandez, pretending to act as her — in substitution of said Juan Bautista Silva, made and executed a lease to one Domingo Gonzalez y Díaz of the tract of land of one hundred and twenty six cuerdas hereinbefore described under letter "B," for a stated term of five years; that thereafter said lease was extended for a further term of ten years, and before the expiration of said term, by various transfers, became the property of the defendant Carlos Cabrera y Paz, who, on the 6th day of February, 1901, attempted and pretended to obtain from said José Laboy y Fernandez a further extension for the term of six years and a half from the first of August, 1909 to the 31st day of January, 1916; the rent agreed to be paid from the present time until said year 1909, being eighty four dollars ($84.00) up to the year 1909 and from said year 1909 to the year 1916 at the same rate. Yet your orator alleges that in said year 1901 when the said extension of six and a half

years was granted to the defendant Carlos Cabrera, the
10 rental value of said land had largely increased over its value in the year 1894, and the said rental of $84.00, eighty four

dollars per year, even in the year 1894 was so far below a just and reasonable rental as to constitute said contract an unreasonable and fraudulent one; and that by virtue of the contents of said last will and testament of Juan Apolinario Laboy and its reference to the terms of said last will and testament of said Silva, the defendant Carlos Cabrera was charged with notice of the want of title in the said José Laboy y Fernandez, and his illegal possession and control of said estate at the time said lease was made, by reason whereof, said lease is wholly null and void, and the said defendant Carlos Cabrera is liable to account to your orator for the reasonable rental of said tract of one hundred and twenty six cuerdas from the date of his first entry into possession thereof, to wit, the 31st of December, 1900.

Twelfth. That on the first day of February 1898, the said José Laboy y Fernandez further pretending to act as heir by substitution of said Juan Bautista Silva, made and executed a lease to the defendant Tomás Torres, of the tract of land of fifty and one half cuerdas hereinbefore described under letter "C," for a stated term of five years beginning from the 1st of August of the same year, and before the expiration of said term, to wit, on the 16th day of February, 1901, said defendant Tomás Torres attempted and pretended to obtain from said José Laboy Fernandez an extension of said term for the period of ten years and a half dated from the 1st of August, 1900, to the 1st of August, 1911; the rent agreed
11 to be paid therefor being at the rate of Thirty Dollars ($30.00) per year, being the same agreed upon in the year 1898. Yet your orator alleges that in said year 1901 when said renewal contract of lease for ten years and a half was entered into, the rental value of said land had largely increased over its value in the year 1898, and the said rental of Thirty Dollars per year was so far below a just and reasonable rental as to constitute said contract an unreasonable and fraudulent one; and that by virtue of the contents of said renewal lease of the 16th of February 1901 and its reference to the terms of said last will and testament of said Juan Bautista Silva and his devisee, Juan Apolinario Laboy, the defendant Tomás Torres was charged with notice of the want of title in his lessor, José Laboy Fernandez, and of his illegal possession and control of said estate at the time said lease was made, by reason whereof said lease is wholly null and void and the said defendant Tomás Torres is liable to account to your orator for the reasonable rental of said tract of fi-ty and one half cuerdas from the date of his first entry into possession thereof, to wit, the first day of August, 1898. The exact description of the above tract of fifty and one half cuerdas is as follows:

A tract of land, without particular name, situated in the barrio "Coto" municipal jurisdiction of Santa Isabel, fenced, and containing fifty and one half cuerdas, more or less, equivalent to 19 hectareas, 84 areas and 85 centiareas, bounded as follows: From a stake of "guayacán" in the north-west corner, the boundary of the lands of Don Juan Cortada, to the west by the quebrada of said

Cortada to a stake of "hueso," bounding the same lands of Cortada; thence on the west side of the quebrada along the line that divides it from the land of said Cortada, to the south to a "guamá" which is a boundary of the lands of said Cortada and of Don Ramón Torres; thence from said "guamá" along the line bounding the lands of said Torres easterly to a stake of "guayacán," which is also a corner, and which serves as a boundary of the lands of the said Torres; thence by way of the boundary of said Torres on the western side, direction north, to the stake of "guayacán," which was the beginning point.

12 Thirteenth. That on the 9th day of January, 1904, the defendant Josefa Diana Martinez pretending to act as the voluntary heir of her husband the said José Laboy y Fernandez, by virtue of the substitution of heirship and the last will and testament of her said husband hereinbefore referred to in paragraph ninth of this Bill, made and executed a lease to the defendant Julio N. Chardón of the two tracts of land, one containing four hundred cuerdas and the other containing one hundred and twenty six cuerdas, heretofore described under letters "A" and "B" for the term of fifteen years from the date of said instrument, thus terminating on the 9th day of January, 1919, the rent agreed to be paid therefor being two hundred and forty dollars ($240.00) per year for the tract of four hundred cuerdas, and eighty four dollars ($84.00) per year for the tract of one hundred and twenty six cuerdas. And your orator alleges that at the time of making said lease the rent so reserved for said tracts of land was so far below a just and reasonable rental as to constitute said contract an unreasonable and fraudulent one; and that by virtue of the recitals contained in the lease aforesaid, the defendant Julio N. Chardón was charged with notice of the want of title in his lessor, the defendant Josefa Diana Martinez, and of her illegal possession and control of said estate at the time said lease was made, by reason whereof said lease was wholly null and void, and the said defendant Julio N. Chardón should be required to account to your orator for the reasonable rental of the said first mentioned tract from the date of said lease, the second tract having been sublet by him, as set forth in the succeeding paragraph hereof.

13 Fourteenth. That on the 20th of January 1900, the defendant Julio N. Chardón, pretending to act as the lessee of the defendant Josefa Diana Martinez, made and executed a sub-lease of the said one hundred and twenty six cuerdas, heretofore referred to, and more particularly described under the letter "B," for the term of fi-teen years from the date of said instrument to terminate on the 9th day of January 1919, for the agreed upon rental of Eighty Four Dollars ($84.00) per year for said tract of one hundred and twenty six cuerdas. And your orator alleges that at the time of making said lease and sub-lease the rent so reserved for said tracts of land was so far below a just and reasonable rental as to constitute said contract an unreasonable and fraudulent one, and that by virtue of the recitals contained in the lease aforesaid, the said defendant Carlos Cabrera was charged with notice of the want of title of his lessor, the defendant Julio N. Chardón, and of the want of title of said original

lessor, the defendant Josefa Diana Martinez, and of her illegal possession and contract of said estate at the time said lease was made, and of the defendant Julio N. Chardón'- illegal possession and control of said tract at the time said sub-lease was made, by reason whereof said sub-lease was wholly null and void, and the said defendant Carlos Cabrera should be required to account to your orator for the reasonable rental of the said above mentioned tract of one hundred and twenty six cuerdas from the date of said sub-lease thereof.

Fifteenth. That during the year 1903 the defendant Josefa Diana Martinez in order to further carry out her fraudulent purpose
14 of claiming as her own the tract of land hereinbefore referred to, of which she and her husband before her were unlawfully in possession in fraud of the rights of your orator, presented to the District Court of Ponce her petition for a "título posesorio," in her own name to said first two described tracts of land, the same being exactly described in her petition as follows:

A tract of land which lies in the jurisdiction of Santa Isabel, barrio of "Boca," consisting of four hundred cuerdas, equivalent to 147 hectareas, 21 areas and 49 centiareas, a part planted with guinea grass and the remainder uncultivated, having a wooden house covered with thatch, in bad condition, entirely surrounded by a fence of wood and palmetto; bounded on the east by the bed of the river "Coamo"; on the south with lands of Baldomero Alvarez, José Toro and the shore of the sea; on the west with lands of Juan Cortada; on the north with lands of Luis Burgos, Ramón Torres and the said Cortada.

And also: "A tract of land bounded on the north with lands of Carlos Cabrera, formerly of Jaime Bas; on the south with more lands of the said Cabrera and by the sea; on the east with other lands of the said Cabrera; on the west with lands belonging today to Julio Mercado, formerly to the Sucesión Monserrate and Jaime Bas; containing one hundred and twnety six cuerdas, equivalent to 29 hectareas, 52 areas and 30 centiareas, situated in the barrio "Boca," municipality of Santa Isabel, and of a value of six thousand dollars."

That said expediente of possession was proceeded with by said defendant and without the knowledge of your orator, and on that account no opposition being made the said Court was fraudulently induced to grant to said defendant a possessory title, which she thereafter presented to the Registrar of Property for the District of Ponce, and obtained their inscription in said registry, such inscription being made as to said first described tract under the number 291,
15 folio 187 and over the Book 8 of Santa Isabel, first inscri-tion, and as to the second under the number 298, folio 144 of book 8 of Santa Isabel.

Sixteenth. That thereafter, in order to more firmly establish her fraudulent claim of title to the said properties legally belonging to your orator, the said defendant Josefa Diana Martinez presented a further petition to the Court aforesaid for the purpose of having decreed in her favor the dominion title to the two tracts of land above described, and also to the third tract of fifty and one half cuerdas, the description of which is contained in paragraph 12 of this Bill.

But your orator obtained information of this last petition before said defendant was able to obtain an *ex parte* decree upon the same and in due time entered its opposition to the granting of said petition, and thereupon the Court aforesaid after hearing the parties refused the prayer of said defendant's petition, and decreed that she is not entitled to a decree granting her a dominion title to said tract of land.

Seventeenth. That on the 15th of April 1878, Federico Pascual, then the owner of the property hereinafter described, made and executed a mortgage in favor of the estate of said Juan Bautista Silva for the sum of six hundred pesos provincial money, upon the following described real estate, to wit:

"A house and lot situated on Union Street, fronting east, of the city of Ponce, and bounded on the left by the lot belonging to the Señoritas Capó and a lot of the Sucesion of Don José de la Rosa; on the west and rear by the same lot of said Sucesion; on the right by a property of Don Joaquín Ferrán, and the Sucesion of Rafael León."

Said mortgage is inscribed in the registry of property of
16 the district of Ponce under the number 4389, folio 93 and over, of volume 110 of said city of Ponce, 2nd inscription. Upon this mortgage interest was paid by the mortgagor, or his representatives, up to the year 1894, and the principal thereof with interest from said date is still due, and the right and title to the ownership of said mortgage, like that of the parcels of real estate hereinbefore described, has been legally vested in your orator since the death of the said José Apolinario Laboy.

Eighteenth. That on the 28th day of August 1888, José Laboy y Fernandez, then the owner of the property hereinafter to be described, executed in favor of the said Dominga Fernandez y Verdés, a mortgage for one thousand eight hundred and fifty pesos, current money, on the following described property, to wit:

A farm of six and one half cuerdas, with a wooden house thereon, situated in the barrio of "Machuelo Abajo," of the municipal jurisdiction of Ponce, bounded on the south by the public road; on the east by the river Bucaná; on the west with a lane and lands of the Sucesión Moreu; and on the north by another lane that divides it from several properties.

That said mortgage was inscribed in the registry of property of the city of Ponce at folio 63 and over, book 39, property number 1928, third inscription.

That on the third day of May, 1890, the property above described was ceded and transferred by the mortgagee to the mortgagee, Dominga Fernandez y Verdés, in payment of the principal of said mortgage and its interest to that date, and this cession is inscribed in the said registry of property at folio 65, book 39 of Ponce, third inscription, property number 1928.

17 That the said Dominga Fernandez y Verdés, by a public notarial instrument dated the 16th of October, 1888, acknowledged that the aforesaid sum of money loaned by her to the said José Laboy y Fernandez belonged to the estate of the deceased Juan Bautista Silva, administered first by her husband, Apolinario Laboy,

and later by herself as substitute heir, in accordance with the will of said Silva, and that the half of the proceeds from said mortgage loan in the shape of interest thereon at the rate of twelve per cent. per annum belonged by right to your orator. Your orator shows that said Dominga Fernandez y Verdés continued to pay the half of the sums realized as interest on said mortgage to your orator even after the aforesaid cession of the mortgaged property as aforesaid to her by the mortgagor José Laboy y Fernandez on May 3rd, 1890, and up to

but that thereafter and on the
ceased to pay said half of said proceeds.

Your orator shows that on the death of said Dominga Fernandez y Verdés, the six and one half cuerdas above described passed to the possession of said José Laboy y Fernandez, and on his death to that of the defendant Josefa Diana Martinez, but that the right and title to the ownership of the funds belonging to the estate of said Silva and so loaned and secured by said mortgage, and the right and title to the land so ceded, as aforesaid, in payment of said mortgage, like that of the parcels of real estate hereinbefore described, has been legally vested in your orator since the death of the said José Apolinario Laboy.

Nineteenth. That on the 21st day of June, 1893, the said José Laboy y Fernandez, further pretending to act as heir by
18 substitution of said Juan Bautista Silva, made and executed a lease for five years to Gustavo Cabrera and the Sucesión of Enrique Cabrera, co-owners of the hacienda "Bocachica," to a tract of land described as follows, to wit:

One and one half cuerdas situated in the barrio of "Capitanejo," municipal jurisdiction of Juana Diaz, bounded on the east, north and west with lands of the Succesión of Don Fernando Labastide, and on the south with the public road.

That before said lease expired, said José Laboy y Fernandez extended same for another five years, and thereafter and before said lease so extended had expired, he further extended the same by a document dated the 31st of December 1900, for another five years, so that said lease should expire on the 23rd of June, 1908, and that the yearly rental stipulated therein was ten dollars and eighty cents ($10.80).

Your orator shows that although said lease and its extensions were so far below a just and reasonable rental as to constitute said contract an unreasonable and fraudulent one; and that by virtue of the contents of said last will and testament of Juan Apolinario Laboy and its reference to the terms of said last will and testament of said Silva, the lessees of said one and one half cuerdas were charged with notice of the want of title in said José Laboy y Fernandez and his illegal possession and control of same at the time said lease was made, by reason whereof said lease is wholly null and void and the said lessees should, therefore, be liable to account to your orator for the reasonable rental of said tract from the date of their first entry into possession thereof; yet, in order to expedite this cause and avoid making

said lessees, to wit, Gustavo Cabrera and the Sucesión Cabrera,
19 composed of Gustavo Cabrera, Mrs. María Cabrera de Lacot and Enrique Cabrera Vestía, parties defendant to this cause, and to avoid the lapse of time necessary to obtain service on them, as the said Gustavo Cabrera and Mrs. María Cabrera de Lacot are absent from this jurisdiction and in Europe, and Enrique Cabrera, who is a minor, is also absent from the jurisdiction, being in the United States, your orator expressly renounces all claim to an accounting by said lessees of any sum which might be considered as a reasonable and just rent for said tract from the time they entered into the use thereof, and your orator will expressly desist from praying the Court that said les-ee be declared null and void and of no effect, but instead will ask for the relief hereinafter prayed.

Your orator, therefore, alleges that the possession and control of the property and estate of the said Juan Bautista Silva, as hereinbefore set forth, by the defendant Josefa Diana y Martinez is wrongful and illegal; that both the title to said estate and the right of possession thereof now is and has been since the death of said Dominga Fernandez y Verdés vested in your orator; that all the acts and doings of said José Laboy Fernandez and Josefa Diana Martinez touching said property have been unwarranted, illegal, and void, and that the various leases made by them, with the exception hereinafter mentioned, and the possessory title to said properties fraudulently obtained by said defendant Josefa Diana Martinez, should be declared null and void and ordered cancelled upon the registry of property by the order of this honorable Court. Your orator
20 alleges that the value of the aforesaid estate is more than Ten Thousand Dollars. Forasmuch, therefore, as your orator is without remedy in the premises except in this Court of Equity, and to the end that the defendants may, if they can, show why your orator, is not entitled to the relief herein prayed, and may, upon their respective corporal oaths, and to the best of their knowledge, remembrance, information and belief, full, true and perfect answer make to this Bill, your orator now prays the Court that your orator may be decreed to be the owner of the full title and dominion to the several tracts or parcels of real estate and the mortgages hereinbefore described, and entitled to the possession and control thereof in accordance with the terms of said last will and testament of the said Juan Bautista Silva; that the failure of the said Dominga Fernandez Verdés to name by last will and testament a successor to herself for the performance of the duties in respect to said properties provided for and made indispensable by the provisions of said last will and testament, may be declared a violation of the provisions thereof and that by such want of compliance with and violation of the terms of said will, the third condition thereof hereinbefore quoted may be declared to have become effective, and thereby the title and right of possession to the said estate of said Juan Bautista Silva to have become vested in your orator by virtue of said alternative provision of said will and ordered to be recorded by the Register of Property; that the possession of said estate by the said José Laboy y Fernandez and Josefa Diana Martinez after the death of said Dominga Fernandez

Verdés, may be decreed to be wrongful and illegal and all
21 their acts and doings in the control and disposition of said estate, illegal and void, and said defendant, Josefa Diana Martinez, decreed to turn over and deliver up the possession and control of all and singular the property of said estate to your orator; that the instrument of lease executed between said José Laboy y Fernandez and the defendant Carlos Cabrera on the 6th day of February, 1901, and all other leases or other documents whereby the said defendant Carlos Cabrera pretends or claims to have any ownership or right of possession in the said tract of land of one hundred and twenty six cuedras described under letter "B" of the third paragraph of this Bill, may be decreed to be null and void and ordered cancelled upon the registry of property, and said defendant Carlos Cabrera decreed to pay to your orator a reasonable rental for the use of said land for all the time he has been in possession of the same, and return the possession thereof over to your orator; that the instrument of lease executed between said José Laboy y Fernandez and the defendant, Tomás Torres, on the 16th day of February 1901, and all other leases or other documents or contracts whereby the said defendant Tomás Torres pretends or claims to have any ownership or right of possession in the said tract of land of fi-ty and one half cuerdas described under letter "C" of the Third paragraph of this Bill, may be decreed to be null and void and ordered cancelled upon the registry of property, and said defendant To*áms* Torres decreed to pay to your orator a reasonable rental for the use of said land for all the time he has been in possession of the same, and to deliver over the possession of the same to your orator; that the instrument of lease executed between the defendant Josefa Diana Mar-
22 tinez and the defendant Julio N. Chardón on the 9th day of January 1904, and all other leases or documents or contracts whereby the said Julio N. Chardón pretends or claims to have any ownership or right of possession in the said tract of four hundred cuerdas and one hundred and twenty six cuerdas, described under letters "A" and "B," of the T*j*ird paragraph of this Bill, and the sublease made of said tract of one hundred and twenty six cuerdas by the said defendant, Julio N. Chardón to the said defendant Carlos Cabrera, on the 20th day of January 1904, may be decreed to be null and void and ordered cancelled upon the registry of property, and said defendant Julio N. Chardón decreed to pay to your orator a reasonable rental for the use of said tract of four hundred acres for all the time he has been in possession of the same, and to deliver over the possession of same to your orator; that the "titulo posesorio" obtained by the defendant Josefa Diana Martinez by decree of the District Court of Porto Rico for the district of Ponce, may be declared to be fraudulent and void and ordered to be cancelled upon the registry of property, and said defendant Josefa Diana Martinez be decreed to be without any right, title or interest of any kind in and to any of the property of said estate of said Juan Bautista Silva; that the mortgage for six hundred pesos upon the real estate described in paragraph Seventeenth of this Bill may be decreed to be the property of your orator as the heir of said Juan Bautisto Silva,

and that the register of property may be ordered to inscribe the right and title thereto in the name of your orator; that the real estate described in the Eighteenth paragraph of this Bill, and which
23 was ceded in payment of the mortgage therein described, may be decreed to be the property of your orator as the heir of said Juan Bautista Silva, and that the said Josefa Diana Martinez may be decreed to deliver over the possession of the same to your orator, and the Register of Property may be ordered to inscribe the right and title thereto in the name of your orator, and that said defendant Josefa Diana Martinez be decreed to render an accounting and pay to your orator whatever profits in the way of interest, rents or use may have accrued on said tract from the date of the last payment of interest on said mortgage to your orator on the — day of ——; that the said real estate described in paragraph Nineteenth of this Bill may be decreed to be the property of your orator as the heir of said Juan Bautista Silva and the Register of Property ordered to register the right and title thereto in the name of your orator, but that the lessees thereof be allowed to remain undisturbed in the occupation and use thereof during the term of their lease, which expires on the 23 day of June, 1908, and that the defendant Josefa Diana Martinez be expressly declared to be the trustee of your orator for the collection of the rents of said lease and ordered to turn the same over to your orator for its use and benefit; and that your orator may have such other and further relief as equity may require and to Your Honor may seem meet.

And may it please your Honor to grant unto your orator a writ of subpœna, issuing out of and under the seal of this honorable Court, to be directed to the said Josefa Diana Martinez, Julio N.
24 Chardón, Carlos Cabrera and Tomás Torres, defendants, commanding them and each of them on a certain day and under certain penalty in the said writ to be inserted, personally to be and appear before your Honor in this honorable Court and then and there full, true and perfect answer make to all and singular the premises, and further to stand, perform and abide such further orders, direction and decree therein as to your honor shall seem meet and shall be agreeable to equity and good conscience, and your orator will ever pray.

ANGEL ACOSTA QUINTERO,
PETTINGILL & LEAKE,
Solicitors for Complainant.

25 EXHIBIT A. Filed with Bill.

Testamento.

En el nombre de Dois Amen.

Sepan todos los que este mi testamento vieren como yo Juan Baustista Silva, natural del partido de Ponce y vecino hoy de Santa Isabel en la Isla de Puerto Rico, de estado soltero, de como cincuenta y ocho años de edad jijo legitimo de Don Antonio y de

Doña Petrona Lugo difuntos halladome enfermo y en cama de la que Dios Nuestro Señor se ha servido mandarme, pero esto no obstante en mi completo juicio memoria y entendimiento natural, creyendo como siempre he creido y confesado, el Misterio de la Trinidad y demas sacramentos que tiene y confiesa nuestra Santa Madre Iglesia Catolica Apostolica Romana bajo cuya fé y creencia siempre he vivido y protesto continuar hasta la muerte; que temeoroso de ella, para cuando me sea llegada la hora no me encuentre desprevenido de disposción testamentaria, otorgo este mi testamento á honra y gloria de Dios y su Madre Santísima Maria Señora Nuestra á quien invoco como intercesora y abogada y lo verifico del modo siguiente.

Primeramente encomiendo mi alma á Dios y el cuerpo lo mando á la tierra de que ha sido formado, sepultandose en el cementerio del lugar donde suceda mi fallecimiento y recomendando á mi albacea, el que mis restos, si no puede ser el día de mi enterro, en el momento en que sea posible se depositen en un panteon que se compre ó construya al efecto al gusto y volutad de dicho Albacea, haciendoseme un entierro llano cantado con las tres misas de alma de á peso cada una, y repartiendose la suma de cien pesos entre veinte y cinco pobres del partido de Ponce que lo merezcan á juicio del mismo Caberalero que se auxiliará al efecto de la autoridad local para que se llene mejor el objeto, haciendose el repartimiento á todos en un día dado.

26 Item. Lego medio real á cada cual de las mandas forzozas y á la pía religiosa las tres pesos de orden con cuya limosna los separo de todo derecho y acción á mis bienes.

Item. Declaro que nunca he sido casado y no tengo tampoco hijos naturales de ninguna especie por consiguiente carezco absolutamente de herederos forzozos y lo que hoy poseo lo he adquirido palmo á palmo, en fuerza de mis economias y de mi constancia al trabajo desde mi más tierna edad como es de pública notoriedad.

Item. Declaro igualmente como bienes que me pertenecen adquiridos legitimamente y de los cuales estoy en tranquila posesión, los siguientes,

Esta estancia de crianza que radica en este barrio de La Boca partido de Santa Isabel, que con el nombre de Mejias y con una área de Dos Cientas Diez y Ocho y Media Cuerdas compré de Don Federico Capó y de su esposa por escritura ante el presente Escribano el veinte y seis de Agosto de mil ochocientos, sesenta y cuatro; Despues de aquella fecha la he aumentado con compras parcilales que he hecho según documentos que se me han otorgado, de modo que hoy tengo en un solo cuerpo en este lugar unas Cuatrocientas Cincuenta Cuerdas de que se compone dicha estancia con la casa de vivienda alta y baja de medera cubierta de tejamanil en mal estado con su cocina; otra casita de madera de palma y paja recien construida cerca de la salida al camino real en terrenos comprendidos en dicha área, que le compré en este mismo año pasado á Don Ramón Torres, paso para bebedero de los animales y otros objetos conocidos como de la propiedad referida que colinda con el río de coamo, con el referido Don Ramón Torres y otros vecinos.

Tengo ademas en este mismo barrio en otro cuerpo en el lugar

del Convento otra área de terreno de como Ciento Veinte
27 y Seis Cuerdas tambien de pastos y malezas comprades á diversos según documentos, de las que seis y media cuerdas compré á la Viuda de Don Manuel Cayteano que no me ha pasado aún escritura para entregarle catorce pesos que le adeudo;

Cincuenta y Media Cuerdas más que me pertenecen en este mismo Partido y lugar nombrado del Coto y Dos Cuerdas Tres Cuadros en el Barrio de Machuelo Abajo Partido de Ponce que le compré á Ramón Santiago.

Tengo varias cabezas de ganado chicas y grandes machos y hembras de que conservo inventario entre mis papeles que conoce perfectamente mi Albacea, así como algún animal caballuno;

Y en efectivo tengo Dos Mil y Pico de Pesos, puesto que de ello estoy gastando para mi enfermedad.

Ademas me está adeudando Don Fermín Astebea de Salinas Mil Pesos Don Domingo Rios de Ponce cuatrocientos cuarenta y cinco pesos; Dos Cientos Cincuenta Pesos Don José Moreo que me tomó prestados por cortos días y alguna que otra deuda á favor insignificante que consta de mis papeles;

Y no debo cantidad alguna á persona mas que las Catorce Pesos de la Viuda Cayetano.

Item. Quiero y es mi voluntad legar como lego á Maria Juliana y Ramona Isabel libertas hijas de Carmen que fué mi esclava, la primera de ellas casada con Roque Colón y la otra soltera que viven en este mismo lugar; Cincuenta Cuerdas de Terreno para las dos, ó sean veinte y cinco cuerdas á cada una; cuya área se le señalará frente al Camino Real de Santa Isabel tomando para ello las veinte y tantas cuerdas que compré últimamente á Don Ramón Torres y lo demás se tomará á continuación de aquellas del terreno de esta estancia donde menos perjuicios sufran los cercados de ésta legandole tambien la casita de tabla y paja que hice construir recien-
28 temente á la salida de dicho terreno de Torres, con la condición de que no puedan disponer del todo ni parte de dicho legado, hasta que no arriben á la mayor edad y muriendo alguna de ellas sin hijo que recaiga el legado en la que sobreviva coolegataria todo ello como prueba del cariño que les tengo porque nacieron en mi poder y las he visto crecer.

Item. Puesto que carezco de herederos forzozos y lo que poseo no quiero se desmembre porque me cuesta muchos años de trabajo y economías es mi voluntad deliberada que extraido que sea el legado antedicho para Maria Juliana y Ramona Isabel hijas de las liberta Carmen y dos vacas paridas una para cada cual de ellas asi como lo necesario para cubrir los gastos de mi enfermedad y entierro, todos mis demas bienes sobrantes que los constituyen terrenos, animales y deudas á favor que llevo mencionadas, tome posesión y entrega de ellos mi buen amigo don Juan Apolinario Laboy vecino de Ponce que merece toda mi confianza hace tiempo, me sirve y acompaña en mis enfermedades desinteresadamente, á quien nombro é instituyo por *mi único heredero voluntario de dichos bienes durante su vida* con las condiciones precisas que le impongo á continuación:

Primera. Que el líquido usufructo de dichos bienes, después de

satisfechas las contribuciones municipales y demás que por derecho se les impongan se divida en dos partes iguales, una para dicho heredero Laboy en recompensa justa de su buena administración y celo por dichos intereses y otra para atender á los pobres enfermos del Santo Asilo de Caridad de las Damas en Ponce, cuya liquidación de productos y entrega de esta parte se hará al fin de cada año por el mismo heredero-administrador, sin otra intervención extraña de ningún género, como cometido de pura conciencia y porque el producto de propriedas como las que dejo, dependen mas ó menos
29 de que sean ó nó favorables las estaciones del año y que no falten á tiempo las lluvias en la comerca.

Segunda. Que siendo mi especial objeto el que no se desmembren ni dividan mis bienes, que tantas privaciones y trabajos me cuestan, á la muerte de Laboy con el debido inventario y razón de ~~tobon~~ ellos al poder y posesión de la persona ques merezca la confianza del mismo don Juan Apolinario Laboy, con iguales facultades y para el propio objeto que llevo aquí consignado, á cuyo fin en el momento en que por mi muerte entre éste en la propiedad y posesión de mis citados bienes deberá precisamente otogar en forma su final disposición testamentaria, en que determine la persona que le haya de sucedar en dicho cometido, cuya facultad de sustituir que acuerdo con tal motivo á Laboy se irá transmitiendo de éste como dejo dicho en persona de su confianza, de aquel en la que merezca la suya, y así sucesivamente siempre por testamento en forma ú otro acto fehaciente que otorgará sucesivamente en el momento en que entren á desempeñar su cargo de heredero substituto, y

Tercera. Que si por no llenarse este requisitio de la sustitución en oportunidad como lo recomiendo, si por pretenciones de algún pariente mío ó extraño, ó por cualquier otro concepto, motivo ó reclamación se quisise hacer ó suponer vacante ó intestada la citada herencia ó sea las bienes que la contituyen, quiero y es mi voluntad que en este último caso, que á la muerte del referido Laboy mi primer heredero, pasen dichos bienes al citada Santo Asilo de Damas de Ponce, como mi heredero substituto que le nombro recomendando en este caso muy especialmente á esta asociación el que se conserve en lo posible bajo buena administración las predichos bienes y solamente sus productos liquidos sean los que se inviertan en el socorro de los pobres enfermos del establecimiento indicado.

30 Item. Nombro por mi albacea y fiel ejecutor testamentario de estat mi final disposición al predicho mi amigo Don Juan Apolinario Laboy con las más amplias facultades que en deracho se necesiten, libre, franca y general administración y completa relevación de fianza y toda garantía.

Finalmente, por el presente revoco, anulo y doy por de ningún valor ni efecto, todo otro testamento que antes de ahora haya hecho ú otrogado de palabra, ó en cualquiera otra forma, y solo quiero valga el presente que otorgo de mi expontánea voluntad ante el infrascrito Escribano Público de este Distrito Judicial Don Francisco Parra y testigos llamados y rogados al intento, que son presentes Don Angel Aguerrevere Licenciado en Medicina, Don José Moreo propietario y Don Juan José Vazquez propietario todos vecinos que

firman todos, haciéndolo el Sr. Aguerrevere á mis ruegos, pues aunque yo sé hacerlo el estado nervioso de la enfermedad no me lo permite en este momento estando en esta mi casa de morada Barrio de la Boca Partido de Santa Isabel á los diez y siete días del mes de Diciembre de mil ochocientos setenta y tres.

En este mismo acto y antes de cerrar este otorgamiento yo el testador aclaro, ordeno y mando que en el caso de venir á recaer la herencia en el Santa Asilo de Ponce, como lo preveo en la tercera condición de la cláusula sexta de éste mi testamento, si por cualquiera motivo no existese ó hubiese desaparecido el referido establecimiento de Caridad cuando llegue aquel caso, vendrá á suceder en dicha herencia con las mismas condiciones y facultades, el Insituto de Segunda Enseñanza de Ponce, y cuando éste no estuviese desgraciadamente planteado, recaerá la predicha herencia en la obra ó establecimiento más maritorio que lo necesite de la misma
31 villa de Ponce, pues que he nacido en dicho Partido y para éste son mis deseos; y nunca fuera de su jurisdiction bajo pretesto ni con motivo de ninguna especie.

Y yo dicho Escribano que presente estoy á este otorgamiento con los testigos y de él doy fé. También la doy de que el testador á quien conozco á pesar de su enfermedad se encuentra á mi parecer y el de los testigos en su completo juicio, memoria y entendimiento natural como lo observo de que certifico—

Como testigo y á ruego de Don Bautista Silva por no poderlo hacer,

A. AGUERREVERE,
Como Testigo, JOSÉ MOREO,
Como Testigo, JUAN JOSÉ VAZQUEZ,
(Signado) FRANCISCO PARRA,
Escribano Público.

Entry of Appearance.

August 13, 1905.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE,
Complainant,
vs.
JOSEFA DIANA Y MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS TORRES, Defendants.

To the Clerk of said Court:

Please enter my appearance for the defendants Josefa Diana Martinez, Julio N. Chardón, Carlos Cabrera and Tomás Torres in above entitled action.

Ponce, August 13, 1905.

C. LOPEZ DE TORD,
Solicitor for Defendants.

3—312

32 *Demurrer to Bill.*

(Filed September 4, 1905.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS TORRES.

To the Honorable Chas. MacKenna, Judge of the Court aforesaid, Sitting in Chancery.

The joint and several demurrer of Josefa Diana y Mertinez, Julio N. Chardón, Carlos Cabrera and Tomás Torres, the above named defendants, to the bill of complaint of Asociación de Señoras del Santo Asilo de Ponce, the above named plaintiff.

Now come the defendants Josefa Diana y Martinez, Julio N. Chardón, Carlos Cabrera and Tomás Torres, for the special purpose and no other, until the question herein raised is decided of objecting to the jurisdiction of this court, by protestation, not confessing or acknowledging all or any part of the matter *of* things in said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, demur to the said bill and for cause of demurrer show:

First. That it appears from the said bill of complaint of
33 the plaintiff, that this court has no jurisdiction to hear and determine this action, all the parties in said bill named being citizens of Porto Rico.

Second. That the said plaintiff has not in and by the said bill of complaint made or stated any such cause as does or ought to entitle him to any such relief as is thereby sought and prayed from or against these defendants.

Third. That the Plaintiff's remedy is barred by length of time, and his right is barred by the statute of limitations.

Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

C. LOPEZ DE TORD,
Solicitor for Defendants.

DISTRICT OF PORTO RICO, *ss:*

Josefa Diana y Martinez makes solemn oath and says that she is the above defendant, and that the foregoing demurrer is not interposed for delay.

JOSEFA A. DIANA V. DE LABOY.

Subscribed and sworn to before me this fourth day of September of 1905.

[NOTARIAL SEAL.] CARLOS J. CHARDÓN,
Notary Public of the City of Ponce.

34 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

C. LOPEZ DE TORD,
Of Counsel for Defendants.

Setting Down Demurrer for Argument.

(Filed October 2, 1905.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA Y MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS TORRES.

Equity.

Now come the complainants herein, by their solicitors, Pettingill & Leake, and move the Court to set down for argument on November Rule Day at the chambers of the Judge at San Juan, the demurrer filed herein by the defendants to the bill of complaint on September 4th, 1905

PETTINGILL & LEAKE,
Solicitors for Complainants.

October 2nd, 1905.

35 *Order Overruling Demurrer, Entered November 20, 1905.*

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA Y MARTINEZ ET AL.

Order.

The Court, upon consideration of the bill herein and the demurrer thereto, is of the opinion that all the allegations of said bill disclosing trusts, construction of wills, accounts and other matters are peculiarly subjects of equity and that no adequate remedy at law is afforded complainants.

The first and third grounds of demurrer were so obviously frivolous that they were abandoned by Counsel for the defendants at the argument, and the second ground alleging that the complainants herein have an adequate remedy at law is so unfounded and frivolous that it could only have been interposed for delay.

Wherefore, in overruling the said demurrer, the Court feels con-

strained to enforce the rule as to costs, and orders the costs of this proceeding thus far to be paid by the defendants.

CHAS. F. McKENNA, *Judge.*

36 *Plea.*

(Filed Dec. 26, 1905.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
versus
JOSEFA DIANA Y MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS TORRES.

The joint and several plea of the defendants Josefa Diana Martinez, Julio N. Chardón, Carlos Cabrera, and Tomás Torres, to the bill of complaint of Asociación de Señoras del Santo Asilo de Ponce.

These defendants, by protestation, not confessing or acknowledging all or any part of the matters or things in the said bill mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say:

That Dominga Fernandez Verdés did not die intestate as alleged in the bill of complaint, because said Dominga Fernandez Verdés had made and executed a will or testament before the notary public don Francisco Parra under date April 24, 1869, naming as her universal heir, and leaving all her property, to her adopted son José Laboy Fernandez, said will or testament having never been revoked; and she, said Dominga Fernandez Verdés, being the second substituted heir of the estate left by Juan Bautista Silva, the substitution instituted by Juan Bautista Silva in his last will had no fur-
37 ther effect according to the law, and therefore the estate of said Juan Bautista Silva did pass, at the death of Dominga Fernandez Verdés, to her adopted son José Laboy Fernandez, her universal heir as aforesaid, and he acquired the legal title over said estate subject to the trust obligation, in accordance with the terms of the will of said Juan Bautista Silva, to deliver to the Santo Asilo de Caridad de las Damas de Ponce for the benefit of the sick poor of said Santo Asilo, the half of the net income of the estate of said Silva. Therefore these defendants demand the judgment of this honorable Court, whether they shall be compelled to answer the said plaintiff's bill of complaint, and humbly pray to be dismissed with their reasonable costs in this behalf sustained.

C. LOPEZ DE TORD,
Solicitor for Defendants.

I hereby certify that in my opinion the aforesaid plea is well founded in point of law.

C. LOPEZ DE TORD,
Of Counsel for Defendants.

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

Personally appeared Josefa Diana Martinez before me, and upon being by me duly sworn, deposes and says:

That she is one of the defendants for whom this plea is interposed; that she has personal knowledge of all the facts set forth in said plea; that the foregoing plea is true in point of fact and is not interposed for delay.

JOSEFA A. DIANA VIUDA DE LABOY.

38 Sworn to and subscribed in Ponce and before me this 26th day of December, 1905.

[NOTARIAL SEAL.] CARLOS F. CHARDON,
Notary Public.

Setting Down Plea for Argument.

(Filed Dec. 29, 1905.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
versus
JOSEFA DIANA MARTINEZ ET AL.

Now comes the complainant herein, by its solicitors, and sets the plea filed herein by the defendants for argument on the 8th day of January, 1906, at ten o'clock A. M., or as soon thereafter on that day as counsel can be heard.

PETTINGILL & LEAKE,
Solicitors for Complainant.

Journal Entry, July 17, 1906.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

Plea herein is overruled *pro forma* and defendants given until August 10 to answer.

39 *Answer.*

(Filed August 10, 1906.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS TORRES.

To the Honorable B. S. Rodey, Judge of the Court aforesaid sitting in Chancery:

The Joint and Several Answers of Josefa Diana Martinez, Julio N. Chardón, Carlos Cabrera, and Tomás Torres, the Defendants.

These defendants respectively, now and at all times hereafter saving to themselves all and all manner of benefit or exception or otherwise that can or may be had or taken to the many errors, uncertainties or imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering say:

That they believe it to be true that Juan Bautista Silva, deceased, the testator named in the bill of complaint being possessed of a large personal estate and of the real estate described in said bill of complaint did, at or about the time mentioned by complainant, make and execute his last will and testament, of such purport and
40 effect, containing all the clauses and conditions in said bill set forth.

And these defendant- further answering say that it is true and therefore they admit that the testator Juan Bautista Silva died on or about the 15th day of May, 1875, without having revoked his said will or testament, that the heir appointed by him, that is to say José Apolinario Laboy took possession of all the property left by said Juan Bautista Silva and that said Laboy continued to administer said property in accordance to the terms of the will.

These defendants further answering say that it is true that they admit that José Apolinario Laboy, complying with the provisions of the will or testament of said Silva, named as the heir of said Silva in substitution of himself, his wife Dominga Fernandez Verdés or in case that she died before said Apolinario Laboy, he named in her stead his foster son José Laboy.

Defendants continue to answer and say that it is true and therefore they admit that at the death of said Juan Apolinario Laboy, his widow Dominga Fernandez Verdés toook possession of the property left by said Silva and administered said property up to her death that took place on or about the 15th day of January, 1891; that said Dominga Fernandez Verdés did not appoint a person to succeed her as her heir in substitution of herself in accordance with

the provisions of the testament of Silva; but these defendants deny that said Dominga Fernandez Verdés had died without having made or executed any will or testament as it is alleged *on* the six- paragraph of the bill of complaint; but on the contrary these
41 defendants allege that said Dominga Fernandez Verdés made and executed on the 24th day of April, 1869, and before the Notary Public of Ponce Don Francisco Parra her last will or testament naming as her universal he-r her foster son José Laboy Fernandez, a true and correct copy of said will is herewith filed marked "exhibit A;" and these defendants further allege that said Dominga Fernandez Verdes died without having modified or in any way revoked her said last will or testament.

These defendants further answering claim that at the death of Dominga Fernandez Verdes, her foster son José Laboy Fernandez became entitled to all the property left by said Dominga Fernandez Verdés as her universal heir appointed by her in her last will or testament, as heretofore alleged; and consequently said José Laboy Fernandez became also entitled to the estate of Juan Bautista Silva, said estate affected by a right of *usufructus* or trust obligation in favor of Santo Asilo de Damas, whereby said Santo Asilo de Damas was entitled to the half net income of the property left by said Silva. And these defendants claim that by the failure of Dominga Fernandez Verdés to appoint a successor in the management of the estate of Juan Bautista Silva, the condition in the will of said Silva whereby a successor ought to be successively named, was not violated, as it is alleged in the paragraph seventh of the bill of complaint, such condition being originally null and void, in accordance with the laws existing at the time that said will of Silva was made and executed existing also at the time of the death of said Silva, said laws forbidding perpetuities of any kind.

And these defendants further claim that said José Apoli-
42 nario Laboy, the heir appointed by said Juan Bautista Silva in his last will or testament as heretofore alleged entered into the possession of the property left by said Silva with the right and power to dispose of the same by any act *inter vivos* or *mortis causa*, the right of *usufructus* in favor of Santo Asilo de Damas being fully protected by its attachment to the land.

Defendants further claim that at the death of Dominga Fernandez Verdes the third clause or condition of said will of Silva, whereby it was provided that in the failure of said José Apolinario Laboy to appoint his successor, the whole estate of said Silva should go to Santo Asilo de Damas, did not become operative and effective, as it is alleged *on* the seventh paragraph of the bill of complaint, such third clause or condition being only operative, in accordance with its wording and meaning, if certain events had taken place at the death of said Apolinario Laboy.

And these defendants claim that at the death of said Dominga Fernandez Verdes, Santo Asilo de Damas did not become entitled to the possession, control and full dominion of the estate of said Silva as complainant allege-, but such possession control and full dominion, affected by the right of *usufructus* of Santo Asilo de Damas, did pass

to the universal heir of said Dominga Fernandez Verdés, that is to say, to said José Laboy Fernandez.

These defendants further allege that at the death of Dominga Fernandez Verdes said José Laboy Fernandez acting as her universal heir took possession and control of the estate of Silva. And
43 these defendants specially deny that in so doing said Laboy Fernandez did act wrongfully and fraudulently, as it is set forth in the bill of complaint, but on the contrary they allege that he acted in good faith and conscience and well believing that he was entitled to said possession and control.

And these defendants further claim that Santo Asilo de Damas accepted and consented to the control and possession of the estate of Silva by said José Laboy y Fernandez, allowing him to administer said estate, approving the accounts of said administration, and accepting and receiving the balance due to Santo Asilo de Damas, that is to say, the half net income of said estate. And these defendants claim that Santo Asilo de Damas is estopped from denying the right of possession and control of the estate of said Silva by said José Laboy Fernandez.

These defendants further allege that at the death of José Laboy Fernandez, his wife the defendant Josefa Diana Martinez acting as his heir, entered into the possession and control of the estate of said Silva, administering the same in good faith and with the knowledge and consent of Santo Asilo de Damas, rendering accounts and delivering to said Santo Asilo de Damas the half net income of said estate. And these defendants specially deny that said Josefa Diana Martinez had ever refused to recognize the rights of complainants in said estate of Silva, but allege that she has always been ready and still is ready to deliver to Santo Asilo de Damas as he did deliver the half net income of the estate of Silva.

And these defendants further allege that Josefa Diana
44 Martinez being the legal owner of the estate of Silva and as such entitled to the possession of said estate, did obtain by judicial process a possessory title to said estate of Silva; and these defendants deny that in so doing she acted fraudulently as it is alleged in the bill of complaint, but it is true that she acted in good faith and conscience, recognizing the rights of Santo Asilo de Damas, and continuing to deliver to the same the half net income of said estate.

These defendants further allege that it is true and therefore they admit that José Laboy Fernandez made and executed a lease to one Domingo Gonzalez Díaz of the tract of land described in the bill of complaint under letter "B," for the term and under the other condition, alleged by complainants; that after different transactions, said lease became the property of Don Carlos Cabrera y Paz; that said Carlos Cabrera obtained from said José Laboy Fernandez a further extension of the term of the lease, but these defendants claim that the rent agreed upon was a reasonable one at the time that the contract was entered into, and taking into account the condition of the land that required great expenses for the appropriation of sugar cane cultivation; and these defendants claim that they did not have notice

of the fact that said José Laboy Fernandez had no power to make and execute leases, but on the contrary they believed and they continue to believe that said José Laboy Fernandez was the legal owner of said land; and these defendants further claim that Santo Asilo de Damas did not object to said lease but on the contrary accepted all the conditions of the same, and said Santo Asilo de Damas
45 collected from said lesse- Domingo Gonzalez Diaz and later from Don Carlos Cabrera y Paz one half of the rent of said lease, and allowed and consented that the other half of said rent *were* delivered to José Laboy Fernandez and after his death to the defendant Josefa Diana Martinez.

And these defendants claim that complainant is estopped from denying the fairness and validity of said lease to said Carlos Cabrera y Paz and that Santo Asilo de Damas by its acts and doings induced said Carlos Cabrera y Paz to make heavy expenses for the amelioration of the land.

Defendants further allege that it is true and therefore they *allege that it is true and therefore they* admit that said José Laboy Fernandez made and executed a lease to defendant Tomás Torres of the tract of land of fifty one and a half cuerdas described in the bill of complaint under letter (C), for the term and under the other conditions set forth in the bill of complaint; but these defendants claim that the rent agreed upon was a reasonable one at the time that the contract was entered into and taking into account the condition of the land that required great expenses to appropriate the same to cane cultivation; and these defendants claim that they did not have notice of the fact that said José Laboy Fernandez had no power to make and execute leases, but on the contrary they believed and they continue to believe that said José Laboy Fernandez was the legal owner of said land; and these defendants claim that Santo Asilo de Damas did not object to said lease but on the contrary accepted all the conditions of the same, and said Santo Asilo de Damas has collected from said lessee Tomás Torres one half of the rent of said lease, and al-
46 lowed and consented that the other half of said rent *were* delivered to José Laboy Fernandez and after his death to defendant Josefa Diana Martinez; and these defendants further claim that complainant is estopped from denying the fairness and validity of said lease to said Tomás Torres, and that Santo Asilo de Damas by its acts and doings induced said Tomás Torres to make heavy expenses for the amelioration of the land.

And these defendants further allege that it is true and therefore they admit that said José Laboy Fernandez made and executed a lease to defendant Julio N. Chardón of the tract of land referred to in the paragraph nine of the bill of complaint for the term and under the other conditions set forth in the bill; but these defendants claim that the rent agreed upon was a reasonable one at the time the contract was entered into and taking into account the condition of the land that required great expenses to appropriate the same to cane cultivation; and these defendants claim that they did not have notice of the fact that said José Laboy Fernandez had no power to make and execute leases but on the contrary they believed and they con-

tinue to believe that said José Laboy Fernandez was the legal owner of said land; and these defendants claim that Santo Asilo de Damas did not object to said lease but on the contrary accepted all the conditions of the same, and said Santo Asilo de Damas has collected from said lessee Julio N. Chardón one half of the rent of said lease, and allowed and consented that the other half of said rent *were* delivered to José Laboy Fernandez and after his death to de-
47 fendant Josefa Diana Martinez; and these defendants further claim that complainant is estopped from denying the fairness and validity of said lease to Julio N. Chardón, and that Santo Asilo de Damas by its acts and doings induced said Julio N. Chardón to make heavy expenses for the amelioration of the land; and these defendants further allege that on the 27th day of January, 1905 and therefore after the bill of complaint was filed, Santo Asilo de Damas, duly represented by its attorney Joaquín Ferrán y Lluis entered into an agreement with defendant Julio N. Chardón whereby it was estipulated that in case that Santo Asilo de Damas should win the present suit in equity, said Asilo de Damas shall be bound to make and execute a lease in favor of said Julio N. Chardon of the same tract of land demised to him by José Laboy Fernandez as heretofore alleged, and it was further estipulated that during the pendency of this suit said Julio N. Chardón would enjoy the benefit of the lease granted to him by said José Laboy Fernandez, and furthermore said Joaquín Ferran y Lluis acting as said attorney for Santo Asilo de Damas, in consideration of said agreement bound himself to cause the solicitor for Santo Asilo de Damas to make a motion to the Honorable Court in order to have the case dismissed against said Julio N. Chardon.

Defendants continue to allege that it is true and therefore they admit that said Julio N. Chardón made and executed a sub-lease of the tract of land of one hundred and twenty six cuerdas described in the bill of complaint under the letter (B) for the term and under the conditions set forth in the bill of complaint; but these defendants claim that the rent agreed upon was a reasonable one at the
48 time the contract was entered into, and that Santo Asilo de Demas did not object to said sub-lease but on the contrary accepted the same, recognizing said Carlos Cabrera as such sub-lessee, and Santo Asilo de Damas by its acts and doings induced said Carlos Cabrera to make heavy expenses for the amelioration of the land.

These defendants further answering say that it is true and therefore they admit that defendant Josefa Diana Martinez presented to the District Court of Ponce her petition for a "título posesorio" for the two tracts of land referred to in paragraph fifteen of the bill of complaint; but these defendants claim that said Josefa Diana Martinez in so doing did not act fraudulently and in bad faith as it is alleged by complainant but on the contrary she made her petition for a "tituio posessorio" believing as she continues to believe that she is entitled to the possession of said two tracts of land; and that said Josefa Diana Martinez after making said petition continue- to recognize the rights of Santo Asilo de Damas delivering to the same one half of the net income of said two tracts of land.

And these defendants, continue to answer and allege that it is true and therefore they admit that said Josefa Diana Martinez presented to the District Court of Ponce her petition to have decreed in her favor the dominion title to the two tracts of land referred to in the precedent paragraph, that Santo Asilo de Damas entered its opposition to said petition; but these defendants deny that said court had ever entered any decree denying that said Josefa Diana Martinez *were* not entitled to have a dominion title, the decree of
49 the court being to the effect of denying only the right to have a question of title decided in an *ex parte* proceeding as was the one established by said Josefa Diana Martinez before the said Court of Ponce.

These defendants further answering say that they admit that one Federico Pascual made and executed a mortgage in favor of the estate of Juan Bautista Silva for six hundred pesos provinciales upon the tract of land described in the seventeenth paragraph of the bill of complaint; but these defendants deny that the title and ownership of said mortgage has been legally vested in complainant since the death of said Juan Apolinario Laboy, as it is alleged in the bill, and they claim that the title and ownership of said mortgage belongs to the defendant Josefa Diana Martinez, the Santo Asilo de Damas being only entitled to one half of the interest produced by said mortgage in accordance with the terms of the will of Juan Bautista Silva.

These defendants further allege that it is true and therefore they admit that on the date alleged in the bill of complaint José Laboy Fernandez executed a mortgage for one thousand one hundred and fifty pesos, current money, on the property described in the eighteenth paragraph of the bill of complaint, that the property mortgaged was transferred by the mortgagor to the mortgagee in payment of the debt, that at the death of Dominga Fernandez Verdés said property passed to the possession of said Laboy Fernandez and on his death to that of defendant Josefa Diana Martinez, that said property belongs to the estate of Silva because it was acquired with moneys of said estate; but these defendants deny that the
50 legal title of said property had been vested in complainant since the death of Dominga Fernandez Verdés, and claim that defendant Josefa Diana Martinez is the sole owner of said property, the Santo Asilo de Damas being only entitled to one half of the net income produced by the same.

And these defendants further answering allege that complainant is a Corporation organized and existing under the laws of Porto Rico, and all the defendants are citizens of Porto Rico.

And these defendants submit to the judgment of this honorable Court and humbly insist that this suit is altogether unnecessary and vexatious, and that complainant, even if *he* had been entitled to the relief asked for, the same might have been obtained by proceedings at law.

These defendants finally allege in addition to the foregoing answer that even in the case that complainant had been vested with the legal title of all the property described in the bill of complaint, since the

death of Dominga Fernandez Verdés as it is claimed in said bill, the cause of the action is barred by the Statute of limitation, defendant Josefa Diana Martinez and her predecessor in title having been in possession of said property during more than ten years before complainant's bill was filed, without any interruption, with good faith and a just title (justo título), inter presentes (entre presentes); and these defendants pray that they may have the same benefit from this allegation as if they had formerly pleaded the same.

Wherefore these defendants having fully answered, confessed, traversed and avoided or denied all the matter in said bill of
51 complaint material to be answered, according to their best knowledge and belief, humbly pray this Honorable Court to enter its judgment that these defendants be respectively *be* hence dismissed, with their reasonable costs and charges in this behalf wrongfully sustained.

C. LOPEZ DE TORD,
Solicitor for Defendants.

PORTO RICO, *District of Ponce, ss:*

Josefa Diana Martinez makes solemn oath and says; I am the above named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts and deeds of any other person or persons I believe to be true.

JOSEFA A. DIANA VIUDA DE LABOY.

Sworn to before me this tenth day of August, 1906.

GUSTAVO RODRIGUEZ,
[NOTARIAL SEAL.] *Notary Public, District of Ponce.*

52 *Replication to Answer.*

(Filed November 30, 1906.)

In the United States District Court for Porto Rico.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

This replicant, the Asociación de Señoras Damas del Santo Asilo de Ponce, saving and reserving to itself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendants, Josefa Diana Martinez, Julio N. Chardón, Carlos Cabrera and Tomás Torres, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insuffi-

cient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by its said bill it has already prayed.

PETTINGILL & LEAKE,
Solicitors for Complainant.

November 30, 1906.

53 *Order Book Entry, January* 12, 1907.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

This cause is heard by the Court without the intervention of an Examiner or Master by consent of counsel, oral and documentary testimony are submitted by the parties, argument of counsel heard and the cause submitted. Parties given until the 18th instant to file briefs.

Journal Entry, February 8, 1907.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA Y MARTINEZ ET AL.

The Court hands down an opinion and findings deciding the issue herein in favor of the complainant, and in accordance therewith the solicitors for the complainant are directed to prepare and submit to the Court a draft of final decree and such orders as may be necessary in the premises.

54 *Opinion.*

(Filed February 8, 1907.)

No. 198. Tried at Ponce.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA Y MARTINEZ ET AL.

This cause was tried before the Court by consent of counsel in open session, without the intervention of an examiner or master. The complainant is apparently a secular, charitable corporation or association organized by a royal decree of the Spanish Crown on November 11, 1863, (2 Leg. Ult. Marina, Rodriguez San Pedro, p.

201), having its headquarters at Ponce in the Island of Porto Rico, and, as appears by letters and certificates from the insular authorities, duly authorized to continue business in the Island at and since the time of the filing of the suit. No point is made in the pleadings as to the capacity of the complainant to sue or be sued. The respondents are all citizens of Porto Rico.

It is a suit in equity praying that the Court declare that,
55 under the terms of a certain will to be hereinafter referred to, the complainant is the owner of a considerable amount of real estate, some five or six hundred cuerdas, in and near said Ponce, and that the possession thereof by the respondents under claim of ownership, under lease or otherwise, be declared wrongful complainant given the absolute possession of the whole of the same, and that an accounting he had between the parties and a decree rendered in favor of complainant for such sum as shall be justly found to be due it from the respondents or either of them.

It seems that some thirty odd years ago, there lived on the south side of the Island of Porto Rico, at or near the said city of Ponce, an old bachelor without family or heirs, by the name of Juan Bautista Silva, who owned a considerable amount of real estate and was possessed of cash and other property, though the former does not seem to cut much figure in this case, and by his will made on the 17th day of September, 1873, left it (save a couple of minor bequests) to a friend of his to be managed during the friend's lifetime, and half of the net product turned over to the complainant for use in its charitable work, the remaining half to be kept by the friend for his trouble. This friend, on taking possession of the property, was to make a will designating who should be his successor in the management and possession of the estate, and that successor on taking possession was to do likewise and name another successor, and so on—the estate to be kept together indefinitely. But it was provided that if a successor was not so named, then the property should go entire to the complainant if it still ex-
56 isted, but if not, then to certain other institutions or parties as will be gathered from the terms of the will itself, a translation of the material parts of which is as follows:

* * * * * * *

"Item. Inasmuch as I have no forced heirs, and what I possess I do not desire that it be dismembered, as it has cost me many years of work and economy, it is my deliberate will that after the extraction therefrom of the legacy hereinbefore mentioned for Maria Juliana and Romona Isabel, daughters of the emancipated Carmen, and two cows with calves, one for each of them, as also what is necessary to cover the expense of my illness and burial, then all my other remaining property composed of lands, animals and debts due me as mentioned, shall be delivered to, and my good friend Don Juan Apolinario Laboy of Ponce shall take possession and charge of the same, as he has merited my confidence for years and serves me and attends to me in my illness so desinterestedly, so I name and constitute him as my sole and only voluntary heir to said estate during his life (a quien nombro é insituyo por mi

único heredero voluntarfio de dichos bienes durante su vida) with the following precise conditions imposed on him:

First. That the net usufruct from said estate, after paying the municipal taxes and others imposed for the same purpose, be divided in two equal parts, one portion for said heir Laboy as a just recompense for his good administration and zeal for said interests, and the other portion to attend to the poor sick of the Santo Asilo de Caridad de las Damas de Ponce, which liquidation of products and delivery of this part shall be executed at the end of each year by said administrator heir without any other outside intervention of any kind, as a duty to be performed by the dictates of conscience and because the product of such properties as I leave depends more or less on the different season of the year being favorable or not and that the rain fail not in the district.

Second. As it is my special object that my properties (bienes) which have cost me so much privation and work, be not divided, I therefore desire that at the death of Laboy they shall pass with proper inventory and statement to the power and possession of the person who shall deserve the confidence of the said Juan Apolinario Laboy, who shall have the same power and privileges and hold it for the same object hereinbefore mentioned. To which end, at the moment of my death when he enters into possession of my estate, he shall precisely execute in due form his final testamentary disposition wherein he shall determine the person who shall succeed him in said charge or trust and whose power of substitution,
57 which I grant for such object unto Laboy, shall be transmitted by the latter, as I have stated before, to a person having his confidence, and so on successively, always by a formal will or other formal act which shall be executed by them successively at the moment they shall be put in charge as substitute heir, and—

Third. That if for any reason this condition of substitution is not complied with opportunely as I have recommended, or if by reason of any claim of my relatives or strangers to me or for any other reason or claim that it is or is supposed to be vacant, or the property unbequeathed by will, then the said inheritance or property that constitutes it, I want, and it is my will that in this latter case and at the death of the said Laboy, my first heir, the said estate shall pass to the said Santo Asilo de Damas in Ponce, which I name as my substitute heir, and in this case I especially recommend to this association that said estate be preserved as far as possible under good administration, and that only the net product obtained from same be employed in helping the poor sick of said establishment.

Item: I appoint as my faithful testamentary executor of this my final disposition, my said friend Don Juan Apolinario Laboy with fullest powers that right requires for free, frank and general administration, and relieving him of giving bond or other guaranty. * * *

At the same time and before closing this instrument, I the testator, declare, ordain and command that in case it shall come to pass that the inheritance shall fall to the Santo Asilo de Ponce, as I foresee, under the third condition of the sixth clause of this my

will, and if for any reason said charitable establishment shall not exceed or shall have then disappeared, in such case the inheritance shall go under the same conditions and powers to the Instituto de Segunda Enseñanza of Ponce, and when this latter shall unfortunately not be in existence, then the inheritance shall fall to the work or establishment most deserving and in most need in the said town of Ponce, because I was born in said district and all my best wishes are in favor of it, and therefore under no circumstances shall it be employed outside of the district under any pretext or for any reason."

About a year and a half after the making of this will, and on the 5th of May, 1875, the testator Silva died and the friend Juan Apolinario Laboy took possession of the estate and complied
58 with the terms thereof as to the special bequests, administered the estate during his lifetime strictly in accordance with the will, delivering to the complainant half of the income of the estate to its satisfaction. About this same time and in further compliance with the will, this friend Laboy made his own will, or some similar instrument, and in it named as his successor to manage this estate, his wife Dominga Fernandez Verdés, and set out in the instrument that in case of her death, he named in her stead his foster son José Laboy.

That the said first manager, trustee or whatever he was, Juan Apolinario Laboy, died in about the year 188– and his said wife at once entered upon the possession and administration of the estate under the terms of his said appointment, and in like manner fully complied with the terms of the Silva will, and gave half the product of the estate to the complainant, to its entire satisfaction, and continued so to do up to the 15th day of January, 1891, when she died. But this trustee or manager, whichever she was, in her lifetime failed to comply with the provisions of Silva's will which required her upon taking possession of the estate to make her own will or by some other such act to name her successor, and for this reason the complainant insists that the third or alternative provision of the Silva will, entitling complainant to the immediate possession of the entire estate, became operative, and that the foster son, José Laboy, by operation of law, faded out of the equation as soon as his foster mother took possession of the estate, but notwithstanding these facts,

The said José Laboy immediately upon the death of his said foster mother, went into possession of the estate and man-
59 aged it up to the time of his death, which occurred on the 13th day of November, 1903, and after taking possession of it, executed on the fourth of October, 1893, a public document called a "Substitution of Heirship," wherein he recited that having taken possession of said estate, under the provisions of the Silva will after the death of his foster mother, he must comply with the provision of the will of Silva in the appointment of his own successor, and for that purpose named his wife, the present respondent Josefa Diana y Martinez, and attempted to confer upon her the powers which he

claimed had been conferred upon himself by his foster father, Juan Apolinario Laboy, having made him alternative under the Silva will; and thereafter, just before the time of his death in 1903, he, the said José Laboy, made his own will and in it, after reciting the facts, attempted to ratify his act in substituting his wife as the trustee or manager under the Silva will.

That upon the death of her said husband, José Laboy, as aforesaid, his said wife, this respondent Josefa Diana y Martinez, claiming to act under the public document and will so executed by her husband, took possession of the said estate and has so continued up to the present time.

It appears also that the said José Laboy in his lifetime made long leases of different portions of the land in question, of some of which leases the complainant had notice and received its share of the rents therefrom, but shortly before his death the said Laboy renewed several of them without notice to the complainant, for long terms, and in several instances received his half of the rent in advance,
60 and in some instances even discounted his share to get the cash in hand. These leases are alleged to have been made for ridiculously low rentals. After his wife, the respondent Josefa Diana y Martinez took possession, she also without notice to the complainant extended some of these leases for long terms beginning in the future, also, as it is claimed, at ridiculously low rentals. Finally, without notice to the complainant, she attempted to, and did get under the local statutes of the Island, a possessory title to all the same, still without notice to the complainant,—when it received knowledge of her acts through the legal notice which the local court caused to be published, and then came in and opposed her application and defeated it. This respondent, Josefa, about the time she began to make efforts to get this complete title in herself, some time in the year 1904, ceased to make any payments of the usufruct or profits of the estate to the complainant, and the latter on ascertaining her intention in the premises, brought this suit.

The answer to the complaint admits the facts above stated as to the making of the original will and the substitution of the said Dominga Fernández Verdés as his successor by the said Juan Apolinario Laboy and the naming of his foster son, the said José Laboy, as alternative substitute as aforesaid, and that the said Dominga Fernandez Verdés did not execute any instrument designating any successor of herself to manage said estate, but alleges that her foster son José Laboy became entitled to manage said estate by reason of the fact that under her will made in 1869 (some four years before the making of the original (Silva) will), he, the said
61 José Laboy was her universal heir, and therefore became entitled to all her property, including whatever rights she had in the Silva estate, the latter of course being subject to a servitude or lien running with the land, to secure the payment of half the net usufruct to the complainant. The answer denies that the failure of Dominga Fernandez Verdes to appoint a successor in the management of the estate, as provided in the Silva will, in any manner violated its provisions, because (as alleged) the law ex-

isting at that time forbade perpetuities of any kind, and that therefore the first beneficiary Juan Apolinario Laboy in fact received the title in fee, subject only to the servitude to run with the land. In other words, the answer sets out and contends that under the Silva will the property went absolutely to the said Juan Apolinario Laboy with power in the latter to sell or transfer the same *inter vivos* whenever he chose, or to will it away or dispose of it in any manner, but at all times subject to the servitude in favor of the complainant for the net half of the usufruct thereof.

The answer further contends that the complainant ratified the act of the said José Laboy in so taking possession of the Silva estate and renting portions of the same to divers persons, by accepting its share of the rent with the full knowledge of the facts, and pleads estoppel against it in that behalf. And in like manner alleges the knowledge of the complainant of the taking possession of the said estate by the respondent Josefa Diana y Martinez, after the death of José Laboy, her husband, and the acceptance by the Com-
62 plainant of rents at such time in the premises, and because of this also, pleads estoppel against the complainant.

It further denies that the respondent Josefa Diana y Martinez has ever refused to recognize the rights of complainant, but claims that she is the legal owner of the said estate and entitled to the possession of the same, and admits that she obtained a possessory title thereto by due process of law, but denies that she acted fraudulently in so doing, as alleged, and asserts her good faith in the premises, because, as alleged, she always recognized the rights of the complainant.

It further admits the making of every lease set up in the complaint, but insists that the same are reasonable, considering the condition and the amount of improvement necessary to be made; that the lessees had no knowledge of any incapacity in the said José Laboy or his wife, the respondent Josefa, to make or extend the same; and that the complainant stood by her and saw the same made, and accepted rents thereunder and permitted without objection the lessees to go to great expense in and about such improvements, and that therefore complainant is estopped, etc.

Respondents further allege that on the 27th of January, 1905, complainant stipulated with one of the respondents, Julio N. Chardón, that in case complainant won this suit, the said respondent should be entitled to continue in possession of the portion of the land he had under lease, at an increased rental.

It further admits certain allegations of the bill about money
63 belonging to the estate, that was loaned out on mortgage and the property afterwards transferred to the party in possession of the estate, and admits that such property belongs to the estate and that complainant is entitled to half the product thereof. It closes by claiming that the only remedy complainant has is an action at law for its share of the profits, and that, at any rate, respondent Josefa Diana y Martinez has been in undisputed possession of the estate for more than ten years and that such fact gives her good title, etc.

At the trial, the complainant introduced in evidence all the several wills, documents, leases, renewals of leases, etc., referred to in the foregoing statement, and in addition, produced oral testimony which was taken down verbatim and filed in the cause. The oral testimony completely sustains the allegations of the bill, and, in the opinion of the Court, shows on behalf of the said José Laboy and his wife, the respondent Josefa Diana y Martinez, a gross, and in law a fraudulent disregard of the rights of the complainant in the premises, even if they were rightfully in possession of the land under the Silva will. These two persons, without notice to complainant, extended leases on different portions of this property for terms beginning at the end of the existing leases sometimes four or five years in the future, and running for periods from five to fifteen years, several of them to expire as late as the year 1919. Under the will this was grossly wrong, because should either of these managers die, (as José in fact did), it left the estate without means to induce anyone to manage it during the unexpired term of such leases. This was all done at a time when rental values of such lands, large portions of which are planted in cane and capable of being prepared for cane, were fast increasing in value and
64 when large portions thereof were worth as high as six to twelve dollars per acre, and even more. And some of the leases and extensions of leases were made for less than a dollar an acre, and none of them were made for anything like what the proofs show was the real rental value thereof at the time. A feeble attempt was made to show that at the time and under the conditions, the leases and extensions were reasonable, but it was a miserable failure. The best evidence of the inadequacy of the price is the fact that one of the lessees, Chardón, (Exhibit Q) came in during this litigation and agreed with complainant to increase the rental of the four hundred cuerdas he holds from $240.00 per annum to $1,350.00 per annum.

The assignments and leases introduced in evidence all bring the land into the possession of the parties named as respondents here. The proofs further show that in every instance these extensions of leases *in futuro* were made without the knowledge of the complainant, and the said José Laboy or his wife, the said Josefa Diana y Martinez, received their half of this ridiculously low lease money in advance, and at times even discounted it for cash in hand. It further appears that in all these leases or extensions of leases, the whole status of the estate was set out by proper reference and recitals of the material portions of the Silva will and the succession of managers and leases thereunder, and therefore it is manifest that every person who dealt with Laboy or wife was not only charged with, but in fact had actual notice of their situation and their powers and rights in the premises and the rights of this complainant.

The first question for the Court to determine is: What was the intention of the original testator Juan Bautista Silva as set out in his will, and what sort of a right under it did his friend
65 Juan Apolinario Laboy, and the complainant respectively have? From the terms of the will itself as above quoted,

and notwithstanding the not very specific phraseology of the scrivener who wrote it for him, it can be plainly seen that Silva intended the *poor of Ponce* to be the real beneficiaries, and that so long as it should be in existence, the complainant should receive one-half the profits of the estate to be expended by it for the benefit of said poor. It is equally apparent that Silva never intended to confer upon his said friend Juan Apolinario Laboy anything but a sort of life administration wage-profit in the estate, coupled with the duty to name anybody he had confidence in, as his managing successor. It may be that, strictly speaking, the legal title passed to Laboy on Silva's death, but the equitable title certainly went to complainant. So it can be seen that at all events he intended this first manager to possess the wage-earning interest in the estate during such friend's life, and that thereafter on the occurrence during the administration of any succeeding manager, of any of the contingencies he provides against in the will, the complainant's absolute right to the immediate whole title and possession of the entire estate was at once to arise. We cannot avoid this conclusion, notwithstanding the contention of counsel for respondents that failure of a trustee manager, to avail complainant, must occur exactly at the time of the death of Juan Apolinario Laboy. We think the will looked to these contingencies as possible of arising during an indefinite period in the future. We are sustained in this view fully, we believe, by the reasoning of Mr. Justice Gray of the Supreme Court of the United States in Barber *v.* Pittsburg, etc. Railway 166 U. S. 83, which opinion was delivered on a some-
66 what analogous state of facts, but is too long to be quoted here. Neither do we think it material to speculate as to whether the Silva will created an estate that can be called *fidei commissum.*

We do not think that there is anything connected with this case that makes it subject to either the English or American chancery rule against perpetuities or the civil law rule in that same behalf. In fact, the Supreme Court of Spain in the Roca case, Alcubilla, Tomo 7, Pag. 1013, December 29, 1886, held in a practically similar case to this that the essential character of the vinculation of property consists in the absolute prohibition to sell the same, and this we think is exactly the rule under the common law, and in the several States of the Union. That Court further held in that same case that the law of Spain of October 11, 1820, only rendered such lay or ecclesiastical institutions incapable of acquiring property when, under the laws and their own regulations, they could not dispose of the same, and it held in that particular case that as Roca left his property in favor of the sick poor domiciled in Badalona and appointed as administrators of the property, the parish priest and the vicar both present and future, and others, to devote the proceeds to that purpose, it was a legitimate gift and could not be attacked by the heirs of the testator. That court further held that there is nothing in the law of 1820 of Spain that prevents an annual or perpetual legacy to be made in favor of a charitable institution, provided that in the form of such legacy no direct or indirect

amortization of property is made, and it cited also a "sentence" of the same court of date November 3, 1890. Both these decisions were after the date of the will here, which was made, as will be seen *supra*, in 1873; and the last decision was after the adoption of the Spanish civil code of 1888.

In that same volume of Alcubilla at page 830, several cases from the Supreme Court of Spain are reported, showing that the law of 1820 preventing perpetuities and mortmains, which was
67 modified in 1855 and re-established in 1856, does not prevent even an institution, that might, because of its structure, be subject to the rule against mortmains, from receiving a gift such as this is.

The complainant, in our opinion, while it is apparent from the royal decree that created it,—*vide* reference *supra*, that parts of its management are in charge of the Sisters of Charity, who perhaps have extra-judicial mortmain succession under their customs, is essentially a lay institution. It is managed by a committee of ladies of the community, both married and unmarried, and without reference, so far as indicated by their charter, to their religious beliefs, and is kept up by public subscription and the income from gifts to it; and above all, it is fundamentally a charitable institution of the most unquestioned kind. Fu-ther, there is nothing in or about its charter or make up that necessarily keeps it from disposing absolutely at any time of the whole or any portion of its property, unless the conditions of any particular gift can be said to impose that condition.

Whatever may be the rule in Spain at the present time with reference to this sort of gift,—and we contend that it is the same as it is in the several States of the Union, and does not prohibit the same, we are of opinion that the general policy of the government of the United States must now apply, unless the local law supervenes to prevent, which we do not think is the case. And we find the law to be that not only are such charitable gifts as this permitted, but they are, as indicated by the Supreme Court of the United States, actually favored as being for public benefit. Instances of such gifts for scientific, educational, charitable and other purposes are of
68 frequent occurrence, as for instance the Stephen Girard gifts to Philadelphia, the Carnegie library gifts, the Smithsonian Institution at Washington, numerous hospitals and orphanages all over the nation, and many other such institutions.

To sustain complainant's contention in this case, one need do but little else than read the opinion in the great case of Executors of John McDonough *v.* Murdoch, 15 How. 366. It is a case bearing great resemblance to the one at bar. There it was squarely held in the opinion that if any condition was attached to the gift that was contrary to law, under the laws of Louisiana, such conditions would be considered as not written in the will, and that is exactly the provision of Spanish law and of the old and new code of Porto Rico.

Mr. Justice Gray in the case of Russell *v.* Allen, 107 U. S. 163, in an opinion that amounts in itself to a most valuable treatise on the

question we are discussing, reviews all the American and English cases on this subject of prohibition of perpetuities and mortmain donations up to that time (1882) and uses language particularly apt here, that: "The testator's directions as to the management of the income must be regarded as subsidiary to the general objects of the will, and whether legal and practicable or otherwise, can exert no influence over the question of its validity."

We are of opinion that this complainant has full capacity to receive this gift under this will and that, in any event, it only lies in the mouth of the residuary legatee or beneficiary, or the government itself, to question its possession, which can be done if the same is proper, at any future time, if complainant retains or uses it
69 contrary to the will. However, the respondents have not questioned complainant's right to take the property; they only contend that the first trustee or manager under the terms of the will, took the estate in fee subject only to a servitude in favor of complainant. With this contention we need have no quarrel, because whether to that extent it is right or wrong, we are utterly unable to agree with respondent's further contention that, subject to this servitude, any of the so-called managers could have willed away the property, save in the manner prescribed, or leave it to his heirs. The contrary intent of the testator is too apparent from the portions of the will above quoted, particularly the last clause that speaks of the Instituto de Segunda Enseñanza of Ponce, and other beneficiaries. We find nothing in the sections of the statutes of Porto Rico quoted by counsel for respondents that in any manner militates against the views here expressed.

As to that portion of the answer setting up the statute of limitations, we do not think the point is well taken. José Laboy and wife, it is true, went into possession of this estate and managed it, but they paid rents to the complainant during their management and this fact alone would, we think, be sufficient to show that they did not hold adversely in the sense of any prescriptive statute, but in addition, in every lease they or either of them made of the property, they set out in recitals that they held under the Silva will, etc. Lapse of time under circumstances like these is no bar to the complainant's right. Oliver *et al. v.* Piatt, 3 How. 333.

Now, it may be argued that, under the second clause of
70 the portion of the will above quoted, all that Silva's friend Laboy had to do was to name "a person deserving his confidence," to manage the estate, and that as he did name his wife for that purpose, he probably had a right to name any other person then in being and *sui juris,* as alternate. This might be admitted, and if his wife failed to qualify or to act, it might well be contented that the alternate could then qualify, take possession and proceed to act. But although he might have a right (which we do not admit) to name such alternate if such person was then living and of age, we do not think that he would have such right if the person was, as was really the fact in this case, a mere infant, because José Laboy, his foster child, was then but fifteen years of age, for which

reason Juan Apolinario Laboy, the foster father and Silva's friend, was forced to provide in the appointing instrument (Exhibit B), that should said child still be a minor when his alleged right to manage the estate accrued, Don Juan Vazquez would be curator of the minor's estate and presumably take charge for him. We do not think Silva ever contemplated such a proceeding.

Furthermore, according to the Silva will, each person that legally took charge of the estate became at once vested with the exclusive right to name the person of his own confidence who should succeed in the management, and for that reason we cannot avoid the conclusion that the moment Laboy's wife Dominga Fernandez Verdes took possession of the estate, all right in José Laboy, the alternate, ceased until thereafter by her specifically named as her successor in the manner provided in the will. She having died without naming any successor to manage the estate, we must, and do hold
71 that the contingency foreseen by Silva that the "condition of substitution is (was) not complied with opportunely," arose, and therefore the estate passed to complainant. José Laboy was a stranger without right when he entered the possession, and being so, he could not name anybody to succeed himself in the possession or management of it. He was a tenant at will, an occupant by license or acquiescence only, and subject to removal at the will of complainant. We must therefore hold that his naming of his wife Josefa Diana y Martinez as his managing successor was beyond his power, and that she is now illegally and wrongfully in possession of the estate.

The intention upon her part to hold adversely to complainant, is made manifest by evidence introduced in the case, particularly by certificates from the title registry office and the local insular court (Exhibits O and P), that when she attempted to get a posessorio title, which she in fact did secure, she alleged in her petition that it was "inconvenient" for her to show, as rejuired under the local statute, by what right she claimed to be in possession of the lands, and continued the same attittude when she thereafter endeavored to have the posesorio title ripen into a dominio title, but in which latter effort she was thwarted by the accident of complaina-t's manager seeing the advertisement which the local tribunal obliged her under the law to publish. We cannot see how she can claim good faith as to this, because she well knew how she came to be in possession, and good faith would indicate that she needed no better title than she had, if she was properly in possession of the estate.

On the whole case therefore we feel constrained to hold,
72 and do hold that the complainant is now vested with the legal title to, and the right to the immediate possession of the entire Silva estate under the Silva will and subject to the terms and conditions thereof, and subject also to its own act as to the right of respondent Julio N. Chardón under Exhibit Q, as we feel that under that Exhibit, complainant has estopped itself from any accounting as to him and has conceded him a lease and possession that is good in law under its terms.

As to the respondent Josefa Diana y Martinez, she will therefore be required to immediately give up the possession of the entire estate to the complainant, and she and the respondents Tomás Torres and Carlos Cabrera will be, and they hereby are required to account to the complainant in the premises as follows: The said Josefa Diana y Martinez for the reasonable rental value and income, as the case may be, of the portion, if any, of said estate, real or personal, held by her alone, since January 1, 1904, which we think is a reasonable date to begin such accounting, as she alleges in her application for possessory title made some short time previous to March, 1904, that she has held adverse possession of the entire estate since the 13th day of November, 1903 (presumably the date of the death of her husband); and the said Carlos Cabrera from August 1, 1904, for the portion held by him under Exhibit J, which is the date of the cessation of the receipt of rent by complainant in the premises, and the said Tomás Torres from August 1, 1905, for the portion held by him under Exhibit G, which is the date of the unlawful renewal of his alleged lease. And all the renewals of leases so made by either the said José Laboy in his life-
73 time, or since his death by his wife, the said Josefa Diana y Martinez, and under which or the renewal thereof, or under sub-leases of which, any of the respondents now hold any of the property, will be, and they are hereby cancelled and held for naught, and all respondents holding under any of the same will be, and hereby are required to immediately give up the possession of the lands, property and premises thus held, to the complainant, saving only the exception hereinbefore indicated with reference to respondent Julio N. Chardón; and all respondents will be required within twenty days from the filing hereof, to execute all necessary deeds, releases, quit claims or other instruments necessary, and in default of their so doing, the Court will, if necessary, appoint a person to make the same.

The accounting here provided for will be had as soon as may be, either by the Court or by any examiner or master to be appointed for that purpose, as may be thought best, and the cause will be retained for such purpose, and any other purpose in the premises that may prove to be necessary; and to this end only, this opinion will be held to be interlocutory.

Proper writs of possession, orders and decrees for the purpose of properly correcting the entries in the local land registry office, and to vest the legal title and possession of the entire estate under proper description in the complainant, and the cancellation of the leases and the doing of all other things hereunder as may be required, will be prepared and entered of record, and it is so ordered.

B. S. RODEY, *Judge.*

74 *Final Decree.*

(Filed February 25, 1907.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

This cause having come on for hearing at the January 1907 Term of this Court upon the bill, answer, replication and evidence presented on behalf of both parties, and said parties having been fully heard by their respective counsel, and this Court having heretofore embodied its findings of fact and conclusions of law in an opinion filed herein on the 8th day of February, 1907; it is now hereby, in accordance with said Opinion, ordered, adjudged and decreed:

1.

That the equity of this cause is with the complainants and that the last will and testament of Juan Bautista Silva, made on September 17th, 1873, and described in said bill of complaint, created a valid trust in favor of complainant as to all the property of which said testator died seised or possessed, except certain legacies therein specified, plainly specified the manner in which said trust should be carried out through the medium of successive trustees, and further provided that said trust should terminate upon failure of any trustee to nominate a successor in the manner specified in that instrument, and the legal title to said property should thereupon pass to said complainant and merge in its beneficial interest, Provided said
75 complainant was still in existence at such time.

2.

That upon the death of Dominga Fernandez Verdéz, the second trustee, on the fifteenth day of January, 1891, said trust terminated and lapsed because of the failure of said second trustee to nominate a successor in conformity with the terms of said last will and testament; that the legal title to said described property belonging to the estate of said Juan Bautista Silva has been, by operation of law, vested in said complainant since said last mentioned date; and that the subsequent possession of said property by José Laboy and Josefa Diana Martinez has been wrongful and without authority of law, and their acts, as pretended trustees under said last will and testament, have been null and void, except in so far as the same were recognized and adopted by the action or tacit consent of the complainant.

3.

That the complainant, the Asociacion de Señoras Damas del Santo Asilo de Ponce, had on the fifteenth day of January, 1891, and still has full legal power and capacity to receive and hold the property in said bill described and that it has been and is now

vested with the full title in fee simple to all and singular the real estate and other property in said bill of complaint referred to, which is to be held upon the trusts imposed by the terms of the last will and testament of Juan Bautista Silva, dated September 17th, 1873, as in this cause construed and interpreted; which property is more particularly described as follows:

76 No. 1. A rustic property situated in the barrio "BOCA," municipality of Santa Isabel, containing one hundred and twenty-six (126) cuerdas, equivalent to forty-nine hectareas, fifty-two areas and thirty centiareas, and bounded on the north by lands of Carlos Cabrera, formerly of Jaime Bas; on the east by lands of Carlos Cabrera and the sea; and on the west by the lands of Julio Mercado, la Sucesión Monserrate and Don Rufino Tricoche.

No. 2. A rustic property situated in the barrio "BOCA," municipality of Santa Isabel, consisting of four hundred (400) cuerdas, equivalent to one hundred and fifty-seven hectareas, twenty-one areas and forty-nine centiareas, enclosed by a fence of wood and a hedge of maya, and bounded on the east by the bed of the Coamo River, lands of Baldomero Martinez and Rufino Tricoche; on the south by lands of the Sucesión Rivera, formerly belonging to Fernando Alvarez, lands of José Gracia Toro, the sea shore and lands of Cleubulino Colón; on the west by lands of Juan Cortada; on the north by lands of Augusto Benjamín y Presu (formerly of Luis Burgos) and lands of Ramón Torres and Juan Cortada.

No. 3. A rustic property in the barrio "COTO," Santa Isabel, enclosed by a fence and hedge of maya, containing fifty and one — (50½) cuerdas, equal to nineteen hectareas eighty-four areas and eighty-one centiareas, and bounded as follows: "From the stump of a Guayacán tree on the northeast corner at a point bounding with lands of Juan Cortada, thence in a westerly direction by the brook of said lands of Cortada to the stump of a Hueso tree forming a corner, point of the same Cortada, thence by the western
77 side in a northerly direction to the Guayacán stump which was the starting point.

No. 4. A parcel of land situated in the barrio Capitanejos, jurisdiction of Juana Diaz, containing one and one-half cuerdas, bounded on the south by the carretera which leads to Santa Isabel and on the remaining sides by lands of the Sucesión of Don Fernando Lebastide, which parcel is now leased to the owners of the Hacienda Bocachica.

No. 5. A mortgage for the sum of six hundred pesos provincial money, executed on the fifteenth of April 1878 by Don Federico Pascual upon a lot with a house thereon described as situated on Union Street fronting east in the City of Ponce, and bounded on the left by the lot belonging to the Señoritas Capó and by a lot of the Sucesión of Don José de la Rosa; on the west and rear by the same lot of said Sucesión, on the right by property of Don Joaquín Ferrán and the Sucesión of Rafael León, which mortgage is inscribed in the Registry of Property for the District of Ponce under number 4389, folio 93 and over of volume 110 of said city of Ponce, second inscription.

No. 6. A farm of six and one half cuerdas, with a wooden house thereon, situated in the barrio of Machuelo Abajo, jurisdiction of Ponce, bounded on the south by the public road, on the east by the river Bucaná, on the west by a lane and lands of the Sucesión Moreu, and on the north by another lane that divides it from several properties, which property is inscribed in the Registry of Property for the District of Ponce under number 1928, at folio 65 of book
78 39 of the city of Ponce, 3rd inscription.

4.

That the possessory title obtained by the defendant, Josefa Diana Martinez, to the two first pieces of property above described, as in said bill of complaint set forth, was obtained by fraud and is hereby decreed to be null and void and of no effect, and that the inscription of said title recorded in the Registry of Property, in pursuance of the decree in said possessory proceedings, is null and void and should be cancelled upon the Registry of Property. That the registry of said mortgage for six hundred pesos, provincial money, above described as property Number 5, should be cancelled in so far as the same appears in favor of any party other than the complainant, and the Registrar of Property should be directed to inscribe the same in favor of said complainant.

5.

That the inscription of said farm of six and a half cuerdas, described as property Number 6 aforesaid, should be inscribed by the Registrar in the Registry of Property as the property of the complainant, subject to the trusts referred to in paragraph 3 hereof, and that the fourth inscription of said property found on folio 65 book 39 of the City of Ponce should be cancelled by the Registrar.

6.

That each and every of the leases now claimed to exist upon any of the parcels of property hereinbefore described by the defendants, Carlos Cabrera y Paz and Tomás Torres, are null and void, because executed without authority and for an insufficient consideration, and the complainant is entitled to the immediate possession
79 of all said described property, with the exception of that held by the defendant Julio N. Chardón, whose possession is hereby declared to be rightful under the confirmation of his lease executed on behalf of the complainant since the beginning of this suit, and that said mentioned leases of defendants Cabrera and Torres should be cancelled upon the Registry of Property; and that said defendant Carlos Cabrera and Tomás Torres are hereby ordered and directed forthwith to turn over to the complainant, or its duly authorized agent, the possession of any and all such properties as they may now hold or control under the leases so declared to be void.

7.

That the provisions of the opinion of the court herein for an accounting between the parties is hereby vacated and revoked, a-d

that the defendant Carlos Cabrera do pay to the complainant, within ten days from this date, the sum of two thousand, two hundred and seventy eigh' and 50/100 dollars ($2,278.50) as rental of the parcel of one hundred and twenty-six (126) cuerdas of land leased by him at the rate of seven dollars per cuerda from August 1st 1904 to March 1st, 1907. That the defendant Tomás Torres do pay to the complainant the sum of five hundred and fifty-nine and 70/100 dollars ($559.70), as rental of the parcel of fi-ty and a half (50½) cuerdas of land leased by him at the rate of seven dollars per cuerda from August 1st, 1905 to March 1st, 1907, and that in case of non-payment of the amounts aforesaid, as herein provided, complainant may have execution therefor.

80 8.

It is further ordered, that the solicitors for the complainant are directed to prepare and present to the Court an order in proper form, directed to the Registrar of Property for said District of Ponce, specifying what entries are to be made or cancelled by virtue of this decree in the books of that Registry, and directing said Registrar to make the corresponding entries; and that the Clerk of this Court do also deliver to said Registrar a certified copy of the opinion of this Court herein and *of this Court herein and* of this decree, to be filed and preserved by him for inspection of all future searchers of title.

9.

It is hereby further Ordered, Adjudged and Decreed, that the complainant have and recover from the defendants all expenses necessarily incurred by it for the translation of documents and for the services of the official stenographer in taking and preparing the evidence in the same for the use of the Court as well as all which may be incurred for the making or cancelling of entries in the Registry of Property, as provided in the last preceding paragraph hereof, the same to be taxed under supervision of the Court and the total sum fixed, and in default of the payment of which complainant may have execution therefor. And complainant shall also recover its costs of suit.

10.

All matters and proceedings not provided for in the foregoing decree are reserved for such further order and decree as the Court may hereafter direct.

81 Done and ordered in open court at San Juan, Porto Rico, this twenty fifth day of February, A. D. 1907.

B. S. RODEY, *Judge.*

Petition for Appeal.

(Filed March 4, 1907.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

In Equity.

The above named defendants conceiving themselves aggrieved by the decree made and entered on the 25th day of February, 1907, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed, and that an order be made fixing the amount of security which the said defendant shall give and furnish on said appeal, and that upon the giving of such security, all proceedings under said order appealed from be suspended and stayed until the final determination of the said appeal and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 4th day of March, 1907.

TORD, TORO & CANALES,
Attorneys for Defendants.

82 *Assignment of Errors.*

(Filed March 4, 1907.)

ASOCIACIÓN DE SEÑORAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS.

The defendants pray an appeal from the final decree of this Court to the Supreme Court of the United States, and assign for error:

1st. That the Court erred in entering a judgment and decree in favor of the Complainant and against the Defendant, contrary to the law and the evidence of the case.

2nd. That the Court erred in not dismissing the bill of complaint and in not entering a judgment in favor of the defendants.

3rd. That the Court erred in holding to be the intention of Juan Bautista Silva under his last will and testament to appoint as his heir the institution called the "Asilo de Damas" and not Juan Apolinario Laboy; and further holding that under said will the

said Juan Apolinario Laboy was considered to be a mere trustee or manager of the estate devised.

4th. That the Court erred in not holding that under the said Silva will the "Asilo de Damas" only acquired a right of usufructus attached to the land demised and not absolute ownership.

83 5th. That the Court erred in holding that in this case it was not material to speculate as to whether the Silver will created what is called by the Spanish law a *fidei commissum.*

6th. That the Court erred in not holding that as long as there was in said Silva will a prohibition to alienate, which said prohibition was null and void according to the law of that time, the estate devised passed to the heir appointed free from such prohibitory condition and apt to be disposed of by said Juan Apolinario Laboy by any deed *inter vivos* or *causa mortis,* subject always to the incumbrance in favor of the "Asilo" for half the rents.

7th. That the Court erred in not applying in the construction of said — with the general rule of interpretation whereby when the language of the will is free from doubt and the intention of the testator is plain and intelligibly expressed, there is no need of interpretation.

8th. That the Court erred in not holding the words of the testament "universal heir" in reference to Juan Apolinario Laboy as conclusively establishing the intention of the testator to confer the title in fee of his estate to Juan Apolinario Laboy and not to the "Asilo de Damas."

9th. That the Court erred in not holding that the third clause or condition of said Silva will (whereby it was provided that in the failure of said Juan Apolinario Laboy to appoint his successor

84 as directed, the whole estate of said Silva should go to the "Asilo de Damas") could only have been construed as having reference to Juan Apolinario Laboy and not, beyond him, to any other person.

10th. That the Court erred in not holding that it was apparent from the said Silva will that the testator's intention was to devise the estate in fee (subject to certain conditions) to Juan Apolinario Laboy, giving only to the "Asilo" a right to half of the rent, the said right being an incumbrance upon the land.

11th. That the Court erred in holding that deficiency of consideration by itself, independent of any other fact, is evidence enough to render a contract void by reason of fraud, which was contrary to the law and the evidence of the case.

12th. That the Court erred in holding that the doctrine of estoppel had no application to the case in hand.

13th. That the Court erred in holding that in spite of the lapse of the required time Josefa Diana Martinez (one of the defendants) had not acquired title by prescription to the estate in the controversy.

14th. That the Court erred in holding that the mere fact that José Apolinario Laboy and wife paid to the "Asilo de Damas" its share of the rents, was sufficient to prevent Josefa Diana Martinez from setting up title by prescription to the Silva estate.

85 15th. That the Court erred in not holding that the payment of rent to the "Asilo" showed only the recognition of an incumbrance (right of usufructus) upon the land on behalf of said "Asilo" and never the recognition of the absolute ownership of the land on behalf of the same.

16th. That the Court erred in not holding that the payment of rent to the "Asilo de Damas" under said will was not inconsistent with the assertion of title to the land demised.

The defendants pray that the said decree may be suspended pending the appeal.

TORD, TORO & CANALES,
Attorneys for Defendants.

Order March 5, 1907.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

Order.

Upon application of Tord, Toro & Canales, solicitors for the defendants herein, the supersedeas bond herein on appeal is fixed at Ten Thousand Dollars ($10,000.00), said bond to be conditioned according to law and approved by the Court. The execution of the writ of possession heretofore issued in this cause is suspended pending the completion of such appeal, on condition that said defendants will not in any way despoil the properties in their possession by cutting cane thereon or removing it therefrom or otherwise, until the bond herein shall have been approved by the Court.

B. S. RODEY, *Judge.*

86 *Journal Entry, March 6, 1907.*

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

The supersedeas bond on appeal herein is approved by the Court and filed and the petition for appeal allowed.

Supersedeas Bond.

Approved March 6, 1907.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE DAMAS DE PONCE
vs.
JOSEFA DIANA MARTINEZ, JULIO N. CHARDÓN, CARLOS CABRERA, and TOMÁS TORRES.

Know all men by these presents that we, Carlos Cabrera y Paz as principal, and Guillermo Shuck Olivera and Luis Casals Suarez,

as sureties, are held and firmly bound unto the "Asociación de Señoras Damas del Santo Asilo de Ponce" in the full and
87 just sum of ten thousand dollars ($10,000.00) to be paid to the said "Asociación de Señoras Damas del Santo Asilo de Ponce" its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 5th day of March, 1907.

Whereas lately at a session of the United States District Court for Porto Rico, in a suit pending in said Court between the said Asociación de Señoras Damas del Santo Asilo de Ponce, complainants, and Josefa Diana Martinez, Julio N. Chardón, Carlos Cabrera, and Tomás Torres, respondents, a decree dated the 25th day of February, 1907, was rendered against the said Josefa Diana Martinez, Julio N. Chardón, Carlos Cabrera and Tomás Torres, respondents, and the said Josefa Diana Martinez, Julio N. Chardón, Carlos Cabrera and Tomás Torres having obtained from said Court an order allowing an appeal to the United States Supreme Court to reverse the decree and order in the aforesaid suit, and a citation directed to the said Asociación de Damas del Santo Asilo de Ponce is about to be issued citing and admonishing said complainant to be and appear at the United States Supreme Court.

Now therefore the condition of the above obligation is such, that if the above named Josefa Diana Martinez, Julio N. Chardon, Carlos Cabrera and Tomás Torres, respondents herein, shall prosecute said appeal to effect, and answer all damages and costs, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

C. CABRERA Y PAZ.
LUIS CASALS.
G. SCHUCK.

Sealed and delivered in presence of
GUILLERMO OPPENHEIMER.
ERNESTO FONT.

88 UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

Carlos Cabrera y Paz, Guillermo Shuck Olivera and Luis Casal Suarez, the parties named as principals and sureties in the foregoing bond, being first duly sworn, each for himself says:

That he is a resident and freeholder in the aforesaid district of Porto Rico (city of Ponce) and is worth the sum of ten thousand ($10,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

A. CABRERA Y. PAZ.
LUIS CASALS.
G. SCHUCK.

Subscribed and sworn to before me this 5th day of March, 1907.

CARLOS J. CHARDON,

[NOTARY'S SEAL.] *Notary Public, Ponce, P. Rico.*

Approved this March 6 A. D. 1907.

B. S. RODEY, *Judge.*

Statement of Facts.

(Filed April 4, 1907.)

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE

vs.

JOSEFA DIANA MARTINEZ ET AL.

This Court having heard and considered all the testimony offered by the parties to this suit finds the facts of this case to be as follows:

I. That some thirty odd years ago there lived near the city of Ponce, Porto Rico, an old bachelor without family or heirs by the name of Juan Bautista Silva, who owned a considerable amount of real estate and who was also possessed of cash and other prop-
89 erty, and that he died on the 15th of May, 1875.

II. That during his life-time, that is to say, on the 17th of September 1873, he made his last will and testament, which translated reads as follows:

Last Will and Testament.

In the name of God, Amen. Know all who this my will and testament shall see that I, Juan Bautista Silva, born in the district of Ponce and a resident at the present time of Santa Isabel, Island of Porto Rico, of single state, about fifty-eight years old, a legitimate son of Don Antonio and of Dña. Petrona Lugo, deceased, being sick in bed, suffering from a disease which God has willed to send me, but still in the full enjoyment of my mental faculties, memory and judgment, believing as I always have believed and acknowledged the Mystery of the Holy Trinity and other Sacraments pertaining to and acknowledged by our Holy Mother Church of the Roman Catholic Apostolic Religion, in which faith I have always lived and do solemnly promise to continue doing so until my death; which as I fear it will arrive, in order that when it come it find me not unprovided of a will; I do execute this my last will and testament in honor and glory to God and Holy Mother, our Blessed Lady of Mary, whose assistance and mediation I implore; and I do verify in the following manner.—First, I commend my soul to God and that the body be returned to the earth therewith it has been formed, and buried in the Cemetery of such place where my death shall occur, and do recommend unto my testamentary executor that my remains, if it should not be possible on the day of my
90 burial then at such other time when it can possibly be done, be buried in a tomb which either shall be bought or con-

structed for such purpose at the pleasure and will of said executor, and that I be given a burial with chant and three masses for so[illegible] of one peso each; and that one hundred pesos be distributed amongst twenty-five of the poor of the district of Ponce who deserve it in the judgment of the said party with the assistance of the local authorities to the better end of my object, and distribution to be made to all on the same day. Item. I bequeath half a real to each of the forced legacies and for religious purposes three pesos as it is ordained, this together with the alms I separate from all rights and actions on my property. Item. I declare that I have never been married and neither have I natural children of any kind, therefore I absolutely lack of forced heirs and what I possess at the present time I have acquired little by little, by virtue of my economy and diligence in working since my most tender youth as it is publicly known. Item. I also declare as property belonging to me legitimately acquired and which I possess undistributed, the following: this farm for breeding located in this ward of Boca, District of Santa Isabel, which by the name of Mejias and having an area of two hundred and eighteen and one half cuerdas, I bought of Don Federico Capó and his wife, as by public deed before the present writer, on the twenty six- of August Eighteen Hundred and Sixty-four, after that date I have increased through partial purchases which I have made according to documents which have been executed in my favor, therefore I have at the present time and in a body, and in this place, over four hundred and fifty cuerdas of which said farm or estancia is composed together with a dwelling house first and second floors of wood, roofed with shingles in bad condition with its kitchen; another small house made of palm boards and
91 straw of recent construction near the exit to the public road on lands included in said area, which I bought in this same past year of Don Ramón Torres, a pass to the watering place of the animals and for other purposes which are known as pertaining to the said property which is bounded by the river Coamo, with the said Dn. Ramón Torres and other neighbors.—I further have in this same ward in another portion at the place of Convento another area of land of about one hundred and twenty-six cuerdas also with pasture and brushwood, bought of different persons according to documents, of which six and one-half cuerdas I bought of the widow Don Manuel Cayetano who has not executed any deed in my favor as yet that I may deliver unto her fourteen pesos which I owe her; fifty and one-half more cuerdas belonging to me in this same district and place called el Coto and two cuerdas three hundredths of a cuerda at the ward of Machuelo Abajo District of Ponce which I bought of Ramón Santiago. I have several heads of cattle large and small, male and female, of which I have an inventory amongst my papers of which my executor has perfect knowledge, and besides some horses; and in cash I have two thousand and odd pesos, as from this amount I am attending to my sickness. Besides Don Fermin Estebea of Salinas is owing me a thousand pesos, Don Domingo Ríos of Ponce four hundred forty five pesos; two hundred fifty pesos, Dn. José Moreo which he borrowed for a

few days; and some other debts in my favor of insignificant amounts which appear on my papers; and I am indebted to no one, further than the fourteen pesos to the widow Cayetano.—Item. I desire and it is my will to bequeath as I do bequeath to María Juliana and Ramona Isabel, emancipated, daughters of Carmen, who was my slave, the first of which was married to Roque Colón and the
92 other single who live in this same place; fifty cuerdas of land for the two, otherwise twenty-five cuerdas to each one, which area shall be as-igned to them before the public road of Santa Isabel taking for such purpose twenty odd cuerdas which I lately bought of Dn. Ramón Torres and the rest shall be taken at the continuation of those lands included in this farm where it will be least prejudicial to the enclosures of same, bequeathing also to them the small house of wood and straw which I have had constructed recently at the exit of said lands of Torres, under the condition that they cannot dispose of the whole or part of said legacy before they reach maturity of age and should the death of one of them occur without leaving any children, that her part of the legacy be assigned to the other who shall survive, the whole of which is bequeathed in testimony of the affection which I bear towards them because they were born in my power and they have grown up under my care.—Item. As I lacked forced heirs and what I possess I do not desire that it be dismembered because it has cost me many years of work and economy, it is my deliberate will that after the extraction of the legacy hereinbefore mentioned for María Juliana and Ramona Isabel, daughters of the emancipated Carmen, and two cows with calves, one for each of them, as also is necessary to cover the expenses of my illness and burial, all my other remaining property composed of lands, animals and debts in my favor which I have mentioned, that they be delivered and that my good friend Dn. Juan Apolinario Laboy of Ponce take possession of same, who is deserving of all my confidence since long ago, serves and attends to me in my illness desinterestedly, who I appoint and in-
93 stitute as my sole and only voluntary heir to said estate during his life under the distinct conditions that I impose on him, as hereinafter shall be stated.—First: That the net usufruct from said estate after paying the municipal taxes and others imposed for the same purpose, be divided in equal parts, one portion for said heir Laboy as a just recompense for his good administration and zeal for said interests, and the other portion to attend to the poor sick of the Santo Asilo de Caribad de Las Damas at Ponce which liquidation of products and delivery of this part shall be executed at the end of each year by the same heir appointed administrator, without any other foreign intervention or interference of any kind whatever, as a duty to be performed by the dictates of conscience, and because the product of such properties as I leave depend more or less on the different seasons of the year being favorable or not and that the rain fail not in the district. Second: As whereas it is my special object that my estate be not dismembered or divided, which has cost me so much privation and work, at the death of Laboy that it pass under the correspond-

ing inventory and full statement of all the properties into the power and possession of the person who shall deserve the confidence of the said Don Juan Apolinario Laboy who shall have the same power and privileges and for the same object hereinbefore mentioned, for which object at the moment that in reason of my death he shall enter into possession of my estate he shall necessarily execute in due form his final will and testament wherein he shall determine the person who shall succeed him in said charge or trust, whose power of substituting which I grant for such object unto Laboy
94 shall be transmitted by the latter, as I have said before, to a person having his confidence, and by him to a person deserving his confidence and so on *successfully* always by virtue of testament executed by them successively at the very moment that they shall be put in charge as substitute heir, and Third: That if in reason of this condition of this substitution not being complied with opportunely as I have recommended, if by reason of any claim of my relatives or strangers to me, or for any other reason or claim it should be wanted to have it or suppose it vacant or unbequeathed by will the said heirloom or otherwise the estate which constitutes same, I wish and it is my will that in the latter case, and at the death of the said Laboy, my first heir, that said estate be transmitted unto the said Santo Asilo de Damas at Ponce which I appoint as my substitute heirs, most especially recommending in this case to this association that said estate be preserved as far as possible under good administration and that only the net product obtained from same be employed in helping the poor sick of the said establishment.—Item.—I appoint as my testamentary executor faithfully to comply with this my last will and testament, my said friend Don Juan Apolinario Laboy with fullest powers required by law, free and general administration and relieving him of giving bond or any other guarantee. Finally, by these presents I revoke, annul and declare as having no value or effect any other testament or will which I may have executed before or granted by verbal promise or in any other form whatsoever, and it is my sole desire that this present one be considered, which I execute of my own free will before the undersigned public writer of
95 this judicial district, Don Francisco Parra and witnesses summoned and requested to appear for such purpose and who are present, Don Angel Aguerrevere Doctor of Medicine, Don José Moreo, landowner, and Don Juan José Vazquez, landowner, all neighbors all of whom sign, and Señor Aguerrevere at my request, for though I know to sign the nervous state caused by my illness does not permit me to do so at this moment being at this my dwelling in the ward of Boca, District of Santa Isabel, on the seventeenth day of the month of December, Eighteen Hundred and Seventy Three. At this same act and before closing this execution, I, the testator, declare, ordain and command that in case the inheritance should come to the Santo Asilo de Ponce as I foresee in the third condition of article six of this my will and testament, if for any reason there shall not exist or should this same charitable establishment disappear then the said inheritance shall be

inherited under the same conditions and empowerments by the Instituto de Segunda Enseñanza, of Ponce, and when this unfortunately shall not be in existence, the said inheritance shall fall to the work or establishment most deserving and in most need of the said town of Ponce, as I was born in said district and all my best wishes are in favor of same, and under no circumstance shall it be employed outside of the district under no pretext whatsoever or for any reason.

And I, said writer, who am present at this execution with the witnesses to which I certify. I also certify to the fact that the testator, whom I know, notwithstanding his illness, is to my judgment and the witnesses' in the enjoyment of complete mental faculties and understanding and natural memory as observed by me.

As witness and at the request of Mr. Bautista Silva, who is
96 unable to do it.

A. AGUERREVERE.

As witness.
JOSÉ MOREO.

As witness.
JUAN JOSÉ VAZQUEZ, Mark.

Francisco Parra—Public writer on this date of the twenty-seventh of July Eighteen hundred seventy five I have issued copy with second seal, clause fifth at the end of this testament to Roque Colón husband of the legatee Juliana:

I certify.

PARRA.

NOTE.—In five sheets of paper, first and last of which having second seal I issued first copy to Don Juan Apolinario Laboy:

I certify:

PARRA.

This copy conforms with its original which is in protocol of the heir to which it refers corresponding to the Notary's office which was in charge of Don Rafael Leós y Paz, to which protocol I submit myself. In testimony whereof and by virtue of the authority granted me by the Honorable President of the Supreme Court of this Island on date of twenty-fourth of this month and year, and which authorization I leave attached to the papers of proof under number forty-eight. I issue this first copy at the request of Don Joaquín Ferrán in six sheets of paper which I rubricate, mark and sign at Ponce, on the twenty-seventh day of May, Nineteen Hundred four.

A mark.

(Signed) LCDO. MAEL LEON.

A Signature.

An excise tax stamp value fifty cents, rendered useless by Notary's seal.

III. That the said Juan Apolinario Laboy took possession of the estate so devised and complied with the terms of the said will as to the special bequest, delivering during his lifetime to the complainants half of the income of the estate to its satisfaction. About the same time he, in compliance with the will, made an instrument, and in it named as his successor or heir his wife Dominga Fernandez Verdez, and also provided in that instrument that in
97 case of her death before qualifying his foster son José Laboy shall be her substitute.

IV. That the said Juan Apolinario Laboy died in about the year —— and his said wife at once entered upon the possession and administration of the said estate under the terms of his said testament, and in like manner fully complied with the terms of the Silva will and gave half of the product of the estate to the complainants to its entire satisfaction, and continued so to do up to the fifteenth of January, Eighteen Ninety-one when she died.

That she in her life-time nevertheless failed to comply with the provisions of Silva will which required her upon taking possession of the estate to make her own will or by some other such act to name her successor or heir, but that she had in 1869 made her last will naming as her universal heir her foster son José Laboy Fernandez.

V. That the said José Laboy immediately upon the death of his said foster mother went into possession of the estate and after taking possession of it executed, on the third of October, Eighteen Hundred and ninety three a public document, a "Substitution of Heirship" wherein he named his wife, the present respondent, Josefa Diana Martinez, as his own successor and attempted to confer upon her the power which he claimed had been conferred upon himself by his foster father Juan Apolinario Laboy having made him alternative under the Silva will; that afterwards just before his death which occurred on the thirteenth of November, Nineteen Hundred and Three the said José Laboy made his own will and in it, after reciting the facts, attempted to ratify his said substitution of heirship.

VI. That upon the death of her said husband José Laboy as aforesaid, his said wife, the respondent Josefa Diana y Martinez took possession of the said estate and so continued on to the present
98 time.

VII. It appears also that the said José Laboy in his lifetime made long leases of different portions of the land in question of some of which the complainants had notice and received its share of the rents therefrom, but shortly before his death the said José Laboy renewed several of them for terms beginning at the end of the existing leases some times four or five years in the future and running for periods from five to fifteen years several of them to expire as late as the year Nineteen Hundred and Nineteen. The lesse-s under said leases are the several other respondents herein. That this was all done at a time when rental values of such lands as those belonging to the estate, large portions of which are planted in cane, and others capable of being prepared for cane planting, were fast

increasing in value, and when large portions thereof were worth as high a yearly rent as six to twelve dollars per acre and even more. That some of the leases and the extensions of the leases were made for less than a dollar an acre, and none of them were made for any thing like what the proofs show was the real rental value thereof at the time.

VIII. That one of the lesse-s (Chardón) came in during this litigation and agreed with complainants to increase the rental of the four hundred cuerdas he holds from two hundred and forty dollars per year to the sum of thirteen hundred and fifty.

IX. That in every instance these extensions of time in *futuro* were made without the knowledge of the complainants and the said José Laboy or his wife, the said Josefa Diana Martinez, received their half of this ridiculously low lease money in advance, and at times even discounted for cash in hand. It further appears that
99 in all these leases or extensions of leases, the whole status of the estate was set out by proper reference and recitals of the material portions of the Silva will and the successions and leases thereunder and therefore it is manifest that every person who dealt with Laboy or wife was not only charged with, but in fact had actual notice of their situation and their powers and rights in the premises and the rights of these complainants.

X. That the respondent Josefa Diana Martinez about the year 1904 obtained in her own individual name in *ex parte* proceedings a possessory title to the property, without notice to complainant. That afterwards she instituted, also without notice, proceedings *ex parte* to obtain a title of dominion to the said properties, but the complainant by chance having received knowledge of such proceedings intervened and such petition of dominion title was then denied by the Court in which it was presented.

The foregoing statement of facts is hereby certified to by the Court to be a correct and true statement of such.

B. S. RODEY, *Judge.*

100

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

To the Clerk:

You are requested to make a transcript of record to be filed in the United States Supreme Court, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following papers to wit: All the pleadings in the case including copy of will in Spanish, the final decree and supplementary orders thereto, the petition and order of appeal, the assignment of errors, the statement of facts as certified to by the judge, the opinion of the Court, the citation and the return thereof.

TORD, TORO & CANALES,
Solicitors for Respondents.

101 In the District Court of the United States for Porto Rico.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA MARTINEZ ET AL.

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing one hundred typewritten pages numbered from 1 to 100 inclusive to be a true a- correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the Clerk of said Court, in accordance with the præcipe filed by the respondents therein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court this 30th day of April A. D. 1907.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.

102 UNITED STATES OF AMERICA, *ss:*

The President of the United States to La Asociación de Señoras Damas del Santo Asilo de Ponce, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington within sixty (60) days from the date hereof in a certain action in which Josefa Diana Martinez *et al.* are defendant and appellants and you are complainant and appellee, to show cause, if any there be, why the decree rendered against the said defendants and appellants, as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this fourth day of April, A. D. 1907.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY, *Judge.*

Attest:
H. H. SCOVILLE, *Clerk.*

[Endorsed:] Filed Clerk's Office, United States District Court, April 6, 1907. H. H. Scoville, Clerk of the Court. Marshal's fees: 1 Service, $2.00. Expenses —.

103 Form No. 282.

Return on Service Writ.

UNITED STATES OF AMERICA, *The District of Porto Rico, ss:*

I hereby certify and return that I have served the annexed writ on the therein-named La Asociacion de S'ra Damas del Santo Asilo de Ponce by handing to and leaving a true copy thereof with N. B. K. Pettingill Attorney of said "La Asociacion de S'r's Damas del Santo Asilo de Ponce personally at San Juan P. R. in said District on the 6th day of April, A. D. 1907.

H. S. HUBBARD,
U. S. Marshal,
By PAUL A. ENGLISH, *Deputy.*

Endorsed on cover: File No. 20,714. Porto Rico D. C. U. S. Term No. 312. Josefa Diana Martinez, Julio N. Chardon, Carlos Cabrera, and Tomas Torres, appellants, *vs.* La Asociacion de Senoras Damas del Santo Asilo de Ponce. Filed May 14th, 1907. File No. 20,714.

In the District Court of the United States for Porto Rico.

No. 198. Ponce District.

ASOCIACION DE SENORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA Y MARTINEZ ET AL.

It is hereby stipulated by and between counsel for the respective parties to the above entitled cause, that the Clerk of the Supreme Court of the United States be and the same is hereby authorized to correct the record by inserting the word "Pasen" after the word "Laboy" and before the word "Con", on page 16, line 14 of said record as printed. Reference is had to the attached certificate of the Clerk of the District Court of the United States for Porto Rico, which certifies that in the transcript of record the above mentioned word was omitted, and that the same should be inserted in order to make a correct copy of the original document in Spanish, now on file in his office.

FRITZ v. BRIESEN,
Counsel for Appellant.
GEORGE E. HAMILTON,
Counsel for Appellee.

In the District Court of the United States for Porto Rico.

No. 198. Ponce District.

ASOCIACIÓN DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE
vs.
JOSEFA DIANA Y MARTINEZ ET AL.

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify that in the transcript of record on appeal to the Supreme Court of the United States from this Court, as printed, there is omitted from page 16 thereof, line 14, after the word "Laboy" and before the word "con" the word "pasen" which should be inserted to make the same a correct copy of the original document in Spanish now on file in my office.

Witness my hand and the Seal of the District Court of the United States for Porto Rico, at San Juan, Porto Rico, this 31st day of March, A. D. 1908, and of the Independence of the United States of America the 132nd.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk of the District Court of the United States for Porto Rico.

[Endorsed:] File No. 20,714. Supreme Court U. S., October term, 1907. Term No. 312. Josefa Diana Martinez *et al.*, app'ts, *vs.* La Asociacion de Senoras Damas del Santo Asilo de Ponce. Stipulation to correct record & certificate of clerk. Filed May 26th, 1908.

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1907.

JOSEFA DIANA MARTINEZ, JULIO N. CHARDON, CARLOS CABRERA and TOMAS TORRES,
Appellants,

vs.

LA ASOCIACION DE SEÑORAS DAMAS DEL SANTO ASILO DE PÓNCE,
Appellee.

No. 312.

Appeal from the District Court of the United States for Porto Rico.

Brief on Behalf of Appellants.

Statement.

This is an appeal from a final decree of the United States District Court for the District of Porto Rico.

On July 7th, 1905, the complainant below (the appellee here) filed, in the United States District Court for Porto Rico, a bill against Josefa Diana Martinez, Julio N. Chardon, Carlos Cabrera and

Tomas Torres, in which bill the following allegations were made (Rec. p. 1).

That on the 17th day of December, 1873, one Juan Bautista Silva made his last will and testament by which he constituted one Juan Apolinario Laboy his sole heir of the properties described in the complaint, on condition that one-half of the net income of said properties should be delivered to the Santo Asilo de Caridad de las Damas de Pónce, a charitable institution, each year, after satisfying municipal and other taxes which should be legally imposed, and with the further condition that the said Juan Apolinario Laboy shall appoint a person who should be named in his last will and testament with the same powers and for the same object, and that this power of substitution given by the testator to the said Laboy should be transmitted successively by each person so named, to discharge said trust; and it was further provided in said will that if, on any account, the said inheritance should become vacant, that in such case, at the death of the said Juan Apolinario Laboy, the whole estate shall pass to the said Santo Asilo de Caridad de las Damas de Pónce.

The bill further alleges that the said Juan Bautista Silva died on the 15th day of May, 1875. That then the said Juan Apolinario Laboy entered into possession of the properties described. That said Laboy carried out the provisions of the will and continued, during his lifetime, to administer the properties according to the said provisions.

That on the 30th day of September, 1875, the said Laboy made and executed his last will and testament, wherein he named his wife, Dominga Fernandez y Verdes as the heir of the said Silva estate in substitution for himself, or, in case of

her death before his, or other legal impossibility, he also named in her stead his foster-son, Jose Laboy, as such heir of the estate of the said Silva, thereby conferring upon said substituted heir the same ample powers which said Silva had conceded to him by his last will and testament hereinbefore referred to.

The bill further alleges that upon the death of the said Juan Apolinario Laboy the said Dominga Fernandez y Verdes, his widow, the person named in his will as his substitute, entered upon the possession of the said estate and continued to possess said estate until the 15th day of January, 1891, on which date she died, but that she had failed to comply with the Silva will requiring her to execute a testament naming the person who should succeed her in the performance of the duties specified in the said Silva will, and that she died intestate.

The bill further alleges that the said Jose Fernandez Laboy, who was named by Juan Apolinario Laboy as his second substitute, took, at the death of the said Dominga Fernandez y Verdes, possession of the said estate, and that he also executed, on the 4th day of October, 1893, a public document, called "a substitution of heirship," wherein he named his legitimate wife, Josefa Diana y Martinez, one of the defendants, as his substitute, and that he also, on the 11th day of November, 1903, executed his last will and testament, whereby he ratified the said substitution of heirship conferred upon the said Josefa Diana y Martinez, one of the defendants.

The bill further alleges that upon the death of the said Jose Fernandez Laboy, the defendant, Josefa Diana y Martinez, acting under the said document, entered upon the control and manage-

ment of the said estate and has continued in possession and control of the same up to the present time, and that she has refused to recognize the rights of the complainant to any extent whatever, and that she, moreover, attempted to execute leases of portions of said estate for long terms of years for inadequate rentals. That she has fraudulently obtained a possessory title to nearly all of the said estate, and that she also made efforts to obtain a dominion title thereof, but was interfered with in that respect by the complainant.

The bill further alleges that many long term leases have been made and executed several times by the defendant, Josefa Diana Martinez to the other defendants, and that said leases were made for inadequate rentals and with a fraudulent intent.

The prayer of said bill is to the effect that the complainant be decreed to be the owner of the full title and dominion to the said estate and that the defendant, Josefa Diana Martinez be decreed to turn over and deliver up the possession and control of all the property of said estate to the complainant. That all the leases described in the will be declared null and void and ordered cancelled, and for many other matters stated in said bill.

To the said bill of complaint there was first filed by the defendants a demurrer, (Rec. p. 18), alleging:

(1) Want of jurisdiction of the Court;

(2) Want of a cause of action entitling the plaintiff to the relief prayed; and

(3) That the complainant's right is barred by the statute of limitations.

The Court overruled the demurrer (Rec. p. 19).

Thereupon the defendants filed a plea (Rec. p. 20) in which they set up that Dominga Fernandez Verdes, on April 24th, 1869, named as her universal heir her adopted son Jose Laboy Fernandez, and that, at the time of her death, she was the sole owner of the said estate, because she being the second substituted heir of the estate left by Juan Bautista Silva, the substitution instituted by the said Silva had no further effect, according to the law, excepting always the provision reserving the right to the complainant of one-half of the net profits.

This plea was overruled by the Court (Rec. p. 21).

Then the defendants filed an answer to the bill (Rec. p. 22) in which they alleged that by the last will and testament of Dominga Fernandez Verdes, executed on the 24th of April, 1869, she instituted Jose Laboy Fernandez as her universal heir of all her property, including the estate of Juan Bautista Silva, an estate affected by a right of usufructus trust obligation in favor of the complainant for one-half of the net income.

That the condition in the will of the said Silva whereby a successor ought to be perpetually named, was null and void under the laws existing at the time of the will made by Silva or at the time of his death, said laws forbidding perpetuities of any kind. That the condition of the will of the said Silva was, besides, only that, in case of failure of the first heir, Juan Apolinario Laboy to appoint his successor, at his death solely, the estate should go to the complainant, and that, therefore, he having complied with said will, this condition could no more apply.

That, therefore, at the death of the said Dominga Fernandez Verdes, her universal heir, Jose Laboy Fernandez became the owner of the said estate alike with the other properties left by her.

The answer further alleges that the defendant, Josefa Diana Martinez has never refused to pay the complainant one-half of the net profits according to the trust imposed by the will, and that the complainant having accepted from Jose Laboy Fernandez and from Josefa Diana Martinez one-half of the net profits aforesaid, has consented to the right of control and possession of the estate of Silva by the defendant, and is estopped from denying it now.

The answer further alleges that the leases referred to in the bill of complaint were made in good faith and for rentals adequate at the time of the making of the said leases and that they were made with the knowledge of the complainant, and that therefore the complainant is estopped from any claim made against them now.

The answer further alleges that the defendant, Josefa Diana Martinez, obtained a possessory title and also tried to obtain a dominion title in a local court having jurisdiction, but was stopped by the complainant's objection, and in which proceeding no final decree was entered, neither could be entered, it being an ex-parte proceeding only.

The answer further alleges that the complainant is a corporation organized and existing under the laws of Porto Rico, and that all the defendants are citizens of Porto Rico.

Finally the answer alleges that the cause of action is barred by the statute of limitation, the defendant and predecessor in title having been in possesion of said property during more than ten years

before the commencement of this suit, without any interruption, in good faith and by a just title.

The issues having been joined by a replication to the answer, a hearing was had by the Court and a decision and decree made in favor of the complainant and against the defendants.

The statement of facts by the Court is to be found in the Record at page 49. The opinion of the Court on page 29, and the final decree on page 41.

A petition on appeal was then filed, together with an assignment of errors (Rec. p. 45), and the appeal was perfected by a supersedeas bond.

Assignment of Errors Relied Upon On This Appeal.

(1). That the Court erred in holding the intention of Juan Bautista Silva to be that Juan Apolinario Laboy shall only be trustee and not his heir of the said estate, subject only to the right of usufruct by the complainant. (Nos. 3, 4, 8 and 10 of the Assignment of Errors.)

(2). That the Court erred in not holding that the condition of perpetual substitution in the Silva will was null and void under the law at that time, prohibiting perpetuities. (Nos. 5 and 6 of the Assignment of Errors.)

(3). That the Court erred in not holding that the third clause or condition of the said Silva will could only have reference to the time of the death of Juan Apolinario Laboy and not beyond that. (No. 9 of the Assignment of Errors.)

(4). That the Court erred in giving the Silva will a construction which is not in accordance with

the geenral rule of interpretation of wills, whereby when the language of the will is free from doubt and the intention of the testator is plain and intelligibly expressed, there is no need of interpretation. (No. 7 of the Assignment of Errors.)

(5). That the Court erred in holding that the deficiency of consideration by itself is evidence enough to render a contract void and to imply fraud. (No. 11 of the Assignment of Errors.)

(6). That the Court erred in holding that the complainant was not estopped. (No. 12 of the Assignment of Errors.)

(7). That the Court erred in holding that the cause of action was not barred by the statute of limitations. (Nos. 13, 14, 15 and 16 of the Assignment of Errors.)

(8). That the Court erred in not dismissing the case (for want of jurisdiction). (No. 2 of Assignment of Errors.)

POINTS.

1. This Court has jurisdiction on appeal.

2. The Court below had no jurisdiction to try the cause.

3. It is the general rule of the Spanish law, as well as of the American law, that wills have to be construed exactly as they read, unless such construction be a ridiculous one or an evidently incorrect one. That therefore the words "sole and only voluntary heir" mean what they say, the same as the words: "at the death of Apolinario Laboy."

4. The law at the time of the death as well as of the date of the will of Silva, prohibits any condition in a will by which the alienation of the estate is interfered with and a perpetuity is intended to be established. Under said law the will is valid in its totality excepting such void condition.

5. That the cause of action is barred by the statute of limitations, notwithstanding the payment of one-half of the profits to the complainant by the defendant.

6. That the complainant is estopped by its own action from setting up any claim to the ownership of the estate or against the validity of the leases.

7. Inadequacy of the price paid is not by itself sufficient proof of fraud in the transaction.

POINT I.

This Court has jurisdiction on appeal.

In Royal Insurance Company vs. Martin, 192 U. S., 149, 161, it was held that this Court has jurisdiction in appeals and writs of error coming from Porto Rico "in every case, without regard to the sum or value in dispute, where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied, *and in every other case where the sum or value in dispute exceeds* $5,000, *exclusive of costs.*"

As the amount involved is over $10,000 (Rec. p. 11, folio 20), the jurisdiction of this Court is clear.

POINT II.

The Court below had no jurisdiction to try the cause.

The United States Court for Porto Rico has jurisdiction in cases where no Constitutional or Federal statutory questions are involved only where one of the parties, either defendant or complainant, is a foreign subject or a citizen of the United States.

In the case at bar, all the defendants are citizens of Porto Rico. The complainant is a corporation organized by a Royal Decree of the Spanish Crown, of November 11th, 1863, that is to say, at the time Porto Rico was a province of Spain, having its residence at Ponce, in the Island of Porto Rico. (Rec. p. 29, folio 54.)

Now we claim that under those circumstances the complainant is not a foreign subject, but is a citizen of Porto Rico.

A natural person born in Porto Rico at the time when Porto Rico was a province of the Kingdom of Spain, will not become a foreigner in Porto Rico after it has been organized as a territory or a people under the Government of the United States or any other government, unless he expressly renounces the citizenship of Porto Rico and becomes a citizen of another country, or unless there is a special provision created, either by treaty between the two governments, that is to say, between the government ceding and the government acquiring the territory, or by a law made in that behalf by the new government acquiring the territory.

The same principle must apply to an artificial person, that is to say, to a corporation organized by law. A corporation organized in Porto Rico under the Spanish Government while Porto Rico was a province of Spain, did not become a foreign

corporation when Porto Rico was ceded by Spain to the United States, and after Porto Rico was organized as a territory or a people, in case such corporation continues to reside and do business in Porto Rico and does not expatriate itself by asking for a new charter from a foreign government.

The Foraker law, that is to say, the Organic Act of Porto Rico called "An Act Temporarily to Provide Revenues in the Civil Government for Porto Rico and for other purposes," enacted on April 12th, 1900, in Section 7, provides: "That all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the 11th day of April, 1900, in acordance with the provisions of the treaty of peace between the United States and Spain, entered into on the 11th day of April, 1899."

In Section 8, it provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally applicable, or provisions thereof, until altered, amended or repealed by the Legislative authority hereinafter provided for Porto Rico, or by Act of Congress of the United States."

Now, the laws under which the corporation has been organized remaining in full force and effect, and the organic act providing that in order to be

exempt from citizenship of Porto Rico there must be done a certain act showing the election of an allegiance to the former government, we claim that a corporation continuing to do business in Porto Rico and to reside therein, organized under the laws governing in Porto Rico formerly, and continuing therein under the new government, becomes a corporation with citizenship in Porto Rico.

The complainant in the case at bar is just in that position, and, therefore, we claim that the complainant and all the defendants being citizens of Porto Rico, the United States District Court for Porto Rico had no jurisdiction over them or to try the case below.

This Court has repeatedly held that when the Court below had no jurisdiction, this Court, even by its own motion, will reverse the decree below. In the case at bar the demurrer set out want of jurisdiction by the Court below, but was overruled.

POINT III.

It is the general rule of the Spanish law, as well as of the American law, that wills have to be construed exactly as they read, unless such construction be a ridiculous one or an evidently incorrect one. That therefore the words, "Sole and only voluntary heir" mean what they say, the same as the words, "At the death of Apolinario Laboy."

Law 5, Title 33, Partida 7 of the Laws of Las Siete Partidas in force when the will was made, provides as follows:

"The words of the maker of the testament must be taken plainly as they sound and the Judge should not deviate from their meaning, except only when it appears with certainty that the wish of the testator was a different one from what the sound of the words is there written."

This law has been re-enacted in the Civil Code, Article 675: "Every testamentary provision shall be understood in the literal meaning of its words, unless it clearly appears that the will of the testator was different. In case of doubt, that which appears more in accordance with the intention of the testator, according to the tenor of the same will, shall be observed."

The law has been construed in a number of decisions of the Supreme Court of Spain, sitting at Madrid, reported in the volume of Reports, called "Jurisprudencia Civil."

The Supreme Court of Spain in the Sentence of March 13th, 1884, vol. 54, page 450, says literally:

"That, as it has been repeatedly declared by the Supreme Court, there is no place for interpretation of the clauses of a will when they are clear and precise, and the context must be literally followed."

Sentence of December 20, 1862, Vol. 7, No. 315, p. 787:

> "Syllabus 4: When the testament is so explicit and definite that it does not offer the slightest doubt, we cannot apply Law 5, Title 33, Partida 7, which provides how we must construe the words of the testator when his dispositions savor of confusion and ambiguity."

Sentence of December 11, 1865, Vol 12, No. 439, p. 461:

"Syllabus 9: When there is no doubt about the meaning of the words of a contract or of a will, there is no necessity of interpretation; therefore we may not apply to the same the rule of interpretation that the words of a contract or will must be construed in such a manner as to make it effective."

Decision of June 21, 1872, Vol. 26, No. 204, pp. 15-16:

"Syllabus 1: Held, that Law 5, Title 33, Partida 7, provides that the words of wills must be understood just as they sound, unless it should appear with certainty that the wish of the testator is otherwise, that his wish is not as the words in which it is expressed, and that his wish would not be disregarded by a decision which holds strictly to his dispositions."

Sentence of March 3, 1873, No. 108, Vol. 27, pp. 395-6:

"Syllabus 1: That the clauses of wills should be understood strictly according to the proper meaning of the words when it does not appear with certainty from them that the wish of the testator is different."

See also Sentence of December 31, 1872, Vol. 27, p. 166, Syllabus 1; and

Sentence of January 24, 1876, Vol. 33, No. 49, p. 191.

See also Pothier, Traite des Donations Testamentaries, Paris, 1890, edited by Bugnet, p. 330, Chap. VII, Sec. 1:

"356. Rule 1: The last wills are susceptible of broad interpretation, and one ought chiefly to try to discover what was the desire of the testator."

"357. Rule 2: One must, nevertheless, not depart from the proper meaning of the terms of the will, unless there are good reasons to believe that the testator understood them in a sense other than their natural one."

The same provisions are found in our law of the construction of wills. The plain meaning of the words used in a will is always presumed to be their meaning, and the burden of proof that they are used in another sense is upon the party claiming so.

See Aspden's Estate, F. C., No. 589.
Daley v. James, 8 Wheaton, 534.
Osborne v. Shrieve, 3 Mason, 391.

It is also invariably so held in the States where the civil law similar to that of Porto Rico is in force, as, for example, in Louisiana and California.

Norris v. Hensley, 24 Cal., 449, 450.
Sharpe v. Kleinberter, 7 La., Ann., 264.

In construing a will, the words are to be construed according to their natural import, unless the context evidently points out that in the particular instance there should be some other construction.

Sheriff v. Brown, 5 Mackey, 172.
In re Hallet, 8 Paige, 378.
Puryear v. Edmondson, 4 Heisk, 51.

A testator must be presumed to have used words in their ordinary primary sense or meaning.

In re Woodward, 117, N. Y., 522.

All doubts are to be resolved in favor of the testator's having said exactly what he meant.

Cady v. Bunn, 46 N. J. Eq..131.

Where the provisions of the will are clear and simple, no reason exists for taking the testator's words in any other than their natural sense.

Wiley v. Lockwood, 86 N. Y., 301.
Lovett v. Buloid, 3 Barb. Ch., 137.

The question is expounding a will is, not what the testator meant, but what is the meaning of the words used by him.

Barrows App. (Pa.) 8 Cent. Rep., 132.
Bates vs. Woodruff, 123 Ill., 205.

Only when technical words are employed in a will in such a manner that to give them their strict meaning would defeat the intention of the testator, apparent from the will, a more liberal or popular interpretation will be given to them in order to carry such intention into effect.

De Kay v. Irving, 5 Denio, 646.

Now the Silva will expressly says: "I name and constitute him (Juan Apolinario Laboy) as my sole and only voluntary heir to said estate." It cannot, therefore, be claimed that he meant him only to be a trustee of the whole estate, and not an heir to it, especially as such a construction, meaning him to be an heir, does not stand in conflict with the rest of the provisions of the will and with the intention of the testator, that one-half of the profits shall go for the benefit of the Santo Asilo de Caridad de las Damas de Pónce.

Moreover, this is the only reasonable construction that can be given, because, if the testator wanted the Santo Asilo de las Damas to be his sole heir, there was not the least impediment, either in law or in fact, preventing him from doing so and expressing this his intention in his last will and testament, as the said Santo Asilo de las Damas was an institution which, under the law, could receive any bequest of any kind of estate, and could be made the subject of any kind of will and testament, without any restrictions whatsoever.

If he then, under these circumstances, chose to name as his sole heir Juan Apolinario Laboy, with the condition only that the Santo Asilo de las Damas should be a beneficiary of one-half of the profits, then this was the testator's intention and nothing else.

The same reason may apply to the words "at the death of Laboy." At the time when the will was made there was in existence a law prohibiting perpetuities. The testator, Silva, must have been advised of the existence of that law by the notary who drew his will, as notaries, under the Civil Law, are obliged to explain the law of the subject to their clients.

He then must have known that a condition which would provide for the reversion of the estate to the Santo Asilo de las Damas at the time of the death of any successive heir of Juan Apolinario Laboy, would create such a perpetuity which the law does not permit.

The testator, therefore, limited the reversion of the estate to the Santo Asilo de las Damas to one period or to one generation only, this not being prohibited by the law; that is to say, to the contingency of the death of Juan Apolinario Laboy without naming a substitute for him.

It is, therefore, clear that the words "at the death of Laboy" cannot be construed to mean "at the death of any of his successors;" first, because that would be contrary to the law and no illegal intention can be imputed to a testator without necessity; and, second, because that would be against the rule of the law which does not permit the changing of the meaning of clear and precise words in a testament and giving them a new interpretation not meant or intended by the testator.

From our reasoning we deduct that the testator Silva intended to make Juan Apolinario Laboy his real heir of his estate and not a trustee only, and that the trust was only limited to the one-half of the net profits of said estate to be delivered to the Santo Asilo de las Damas.

We also deduct from the foregoing that the testator had intended that the whole estate left by him shall revert to the Santo Asilo de las Damas in case Juan Apolinario shall not comply with a condition to name a substitute for himself and shall revert only at his—that is to say—Juan Apolinario Laboy's death, and at no other time and at no other contingency.

Juan Apolinario Laboy having complied with the said condition and having named a substitute for himself at his death, there did not arise the contingency which was contemplated in the Last Will and Testament of Silva, and, therefore, at that time, that is to say, at the death of Juan Apolinario Laboy, the reversion of the estate of Silva to the Santo Asilo de las Damas did not take place, as the contingency did not arise; and at no other time could it take place, as there is or was no provision in the will for any other contingency which would give the reversion of the estate to the Santo Asilo de las Damas.

POINT IV.

The law at the time of the death as well as of the date of the will of Silva prohibits any condition in a will by which the alienation of the estate is interfered with and a perpetuity is intended to be established. Under said law the will is valid in its totality, excepting such void condition.

(*a*) It is clear from the context of the will that the intention of the testator was to provide a trust or fideicomiso of one-half of the net profits of his estate for the benefit of the Santo Asilo de las Damas.

Del Viso, one of the standard law authors of Spain, in his well-known book, "Lecciones Elementarias de Derecho Civil Mercantil y Penal de España," gives a very clear definition of the word "fideicomiso." He says (Vol. 2, p. 397):

> "A fideicomisary substitution is that in which the testator charges the instituted heir with the restriction of the estate to another. * * * In order that we may clearly explain the doctrine of jurisprudence in this class of substitutions, we will designate by their proper names the persons who intervene in them, namely:
>
> "Fideicomitente"—the testator, who is the one who establishes it; "fiduciario"—the person which is instituted as heir with the charge of delivering the estate to another; "fideicomisario"—that person to which the estate must be delivered; and "fideicomiso" we name the estate which is left to a person, by or through

the intervention of another person or by an indirect method."

Among the different kinds of fideicomiso, there is one which we may designate by the name "fideicomiso perpetuo," with a prohibition to alienate the estate, and this prohibition may be either expressed or implied.

Says the Supreme Court of Spain, in the Sentence of November 23rd, 1883, Vol. 53, page 233:

> "The clause in a testament in Cataluña by which a testator has instituted as universal heirs of his estate, his son, and on his death, successively, his descendants down to the fourth generation, reveals clearly the object of the testator to institute a familiar fideicomiso, the circumstance that he does not expressly prohibit the alienation of the estate not impeding us to consider such a fideicomiso institution as established, as well because in the special legislation of Cataluña there is no rule which exacts that such a prohibition must be explicitly stated, as because, without a necessary indispensable obligation to conserve the estate, the will of the testator—that in case of the death of his son the estate passed to his grandsons in the other in which he named them, down to the fourth generation—could not be complied with."

See also Sentence of the Supreme Court of Spain of the 12th of June, 1886, Vol. 60, page 105.

Section 14 of the Law of October 11th, 1820 (repealed on the 11th day of March, 1824, but reenacted on the 30th day of August, 1836), provides as follows:

> "No person shall, from now on, even in the way of betterment or under any other title or pretext, institute 'mayorazgos,' 'fideicomisos,' patronages, chaplainships, 'obra pia,' neither any vinculation of any class of property or property rights, neither prohibit, directly or indirectly, their alienation."

The law of October 11th, 1820, can be found in Alcubilla's Dictionary of Law and Legislation, Vol. 7, page 1004.

The Royal Order of March 11th, 1824, repealing the same, may be found in Alcubilla, Vol. 7, page 1006.

The Royal Decree of August 30th, 1836, which re-establishes the law of 1820 prohibiting fideicomisos, may be found in Alcubilla, Vol. 7, page 1006.

The prohibition of prevention of alienation or perpetuities in wills and testaments is still in effect in Porto Rico, as may be seen from the Civil Code, Section 769, which provides as follows:

> "Substitutions in trust, by virtue of which the heir is entrusted with preserving and transmitting to a third person the whole or part of the inheritance, shall be valid and effective, provided they do not go beyond the second degree, or that they are made in favor of persons living at the time of the death of the testator."

Section 773:

> "The following shall produce no effect:
>
> (1). Substitutions in trust not made in an express manner, either by giving them this

name or by imposing upon the sustitute the absolute obligation of delivering the property to a second heir.

(2). Provisions containing perpetual prohibitions to alienate, and even a temporary one, not within the limits fixed in Section 769.

(3). Those imposing upon the heir the charge of paying a certain income or pension to several persons successively beyond the second degree.

(4). Those, the object of which is to leave the person the whole or part of the inheritance, in order that he may apply or invest it according to secret instructions given him by the testator."

According to the terms of the will of Silva the heir appointed by him, Juan Apolinario Laboy, was bound to preserve the estate intact and to transfer it at his death to a substitute or second heir; this second heir was bound, under the will, to preserve the estate intact and to transfer it at his death to his substitute or a third heir, etc., *ad infinitum*.

According to the terms of the said will the heir, Juan Apolinario Laboy, was prohibited from disposing of the estate by any act *inter-vivos*, as sale or gift, or any kind of donation; he was bound to transmit it only by will to his substitute or heir, preserving the whole estate without any division or diminution.

According to the terms of the will the second heir was under the same obligations not to divide or diminish the estate by any act *inter-vivos*, sale or gift, or donation, but was obliged to transmit

it only by will to his substitute or heir, preserving the whole estate without any division or diminution, in his turn.

The third substitute or heir was bound by the same conditions, and so was the fourth, and the fifth, and all future heirs, *ad infinitum*. None of them could alienate, by sale or gift or in any way, the said estate.

It is therefore clear that by the said will Silva tried to establish a fideicomiso perpetuo, and therefore the clause of the will establishing such is and was void under the law of 1820 above quoted.

Here we have to point out an error of the court below in misunderstanding the defendant's contention about the extent and meaning of the law prohibiting perpetuities.

We never intended to claim, and never did claim, that the complainant herein, Santo Asilo de las Damas, was prohibited from receiving any charitable or any kind of bequest under the law of perpetuities and mortmains. Under the Spanish law by us quoted there is no such prohibition to bequeath any estate to a charitable institution, unless the will should prohibit any further alienation, which clause, by the way, would be void in a will instituting any person as heir and not only a charitable institution.

It is not the fact that this complainant is a charitable institution that we ever pointed out as a defense in the case at bar. The complainant is perfectly able to take any bequest or legacy or devise under the laws of Spain, and we never attacked that right of the complainant. What we claim is that the complainant never became an heir of the Silva estate: first, for the reason that the clause of the said will establishing a fideicomiso perpetuo is

void; and, second, because even if it would not have been void, the reversion of the estate to the complainant could only take place at one certain time, or period, or contingency, and that is, at the death of Juan Apolinario Laboy, the first heir, without providing a substitute; but, as he did provide a substitute, the reversion did not take place, and at any time after that it could not take place, because there was no provision for it in the will. But we always admitted that if not for the void clause of the will, and if the complainant would have been instituted by the will as an heir, and not solely as a beneficiary of one-half of the profits, it would have been able, under the law, to receive the estate.

Therefore the Roca case, decided by the Supreme Court of Spain, quoted in the opinion of the judge below, does not at all apply to our argument and to our defense. Neither do the other cases, on page 830 of Alcubilla, mentioned in the said opinion of the judge below, apply to our argument and defense. Neither do the American cases cited in that opinion apply. All these cases refer to the capacity of a charitable institution to receive a bequest or legacy or devise, which right we never disputed.

The facts set forth in the Spanish decision of the above quoted Roca case are the following:

Juan Antonia Roca instituted in his will as his heir a charitable corporation of Badalona. The relatives of said Roca brought an action to set aside the will on the ground that a mortmain, after the laws against perpetuities were enacted, was incapable of acquiring by will.

The facts in the case at bar are totally different. In the case at bar the illegality does not consist in naming a charitable institution as heir or legatee, but it does consist in making obligatory upon the successive heirs to name successors *ad infinitum*

without being permitted to alienate the estate during their lifetime or to leave it ab-intestate to their heirs.

It seems to us that the court below did not pay any attention to our argument pointing out where the illegality of the will consists and mistakenly took it to consist in the fact that a beneficiary is a charitable institution.

The illegality of the clause in the will we claim to consist not in this, which is perfectly legal, but in the fact that there was a prohibition of alienation imposed upon all the successive heirs under said will in perpetuity, which prohibition of alienation, express or implied, is void under the Spanish law above quoted.

(*b*) Also, a clause in a will may be void as contrary to the established law, but this does not make the whole will invalid. The will, in its entirety, still remains valid, with the exception as to the void condition. We sustain that, though the clause of the will establishing a fideicomiso perpetuo is void, the will of Silva is a valid will, and so is the clause appointing Juan Apolinario Laboy as his sole and voluntary heir. In other words, Juan Apolinario Laboy acquired the legal title to the estate, subject only to the delivery of one-half of the net profits to the Santo Asilo de las Damas, but without the obligation not to alienate it and to transfer the estate to his substitutes *ad infinitum*. He received the estate by the will with the right to dispose by any act inter-vivos or mortis causa of the said legal title to the said estate, excepting always the beneficiary interest of the complainant to the one-half of the net profits, or, so to say, to the usufructus of the complainant, such usufructus

being a right attached to the land and therefore fully protected by the law.

The following provisions of the Civil Code, which are only declaratory of the law existing at the time of the enactment of said Code and since the law of perpetuities was enacted, will sustain our contention.

Section 792 of the Spanish Civil Code (Sec. 780 of the Civil Code of Porto Rico) provides as follows:

> "Impossible conditions and those contrary to law and good morals shall be considered as not imposed and shall not prejudice the heir or legatee in any manner whatsoever, even when the testator disposes otherwise."

Section 774 of the Civil Code of Porto Rico provides as follows:

> "The nullity of a substitution in trust shall not prejudice the validity of the designation nor of the heirs first designated; the *cestui que trust* clause shall simply be considered as not written."

Section 775 of the same says:

> "The provision by which the testator leaves a whole or a part of the inheritance to a person and the usufruct to another, shall be valid. If several persons are designated, not simultaneously, but successively, the provisions of Section 769 shall be observed."

Section 776:

> "A provision imposing upon an heir the obligation of perpetually investing specified sums in charitable works, as dowers for poor maidens, pensions for students or in favor of th poor, or for any charitable institution, or public institution, shall be valid upon the following conditions: if the charge is imposed on real property and is temporary, the heir or heirs may dispose of the encumbered estate, the lien not being removed until its record is cancelled. If the charge is perpetual, the heir may capitalize it and invest the capital, at interest, in a first and sufficient mortgage. The funding and the investment of the principal shall be made with the intervention of the Governor of Porto Rico and, after him, the Attorney General. In any case, if the testator should not have established an order for the administration and application of the legacy for charity, the proper administrative authority, according to law, shall do it."

The law is clear on this point, and we deem it unnecessary to cite any further authorities. Whenever a person is appointed as heir with an obligation not to alienate the estate, but to transfer it perpetually by substitution, as in the case at bar, such heir will take the estate with full power to dispose of the same. So the heir, Juan Apolinario Laboy, took possession of the estate of Silva with full power to dispose of the sa[illegible] in any manner whatsoever. Of course, always subject to the right of usufructus in favor of the Santo Asilo de las Damas.

It does therefore matter very little, or rather not at all, that the second heir, or the third, or the fourth, or the fifth, etc., did not comply with the provision to substitute other persons in their stead, because that provision was void originally, and Juan Apolinario Laboy took the estate without any such void and illegal obligation; once the estate vested in him in full, without any restrictions, except as to the usufructus of one-half of the net profits in favor of the complainant, his heirs could do what they pleased with it and were under no obligation to provide for substitutes or to make any will or testament at all. This estate could just as well pass to the legal heirs of Juan Apolinario Laboy and to the legal heirs of his heirs ab-intestate, without any will or testament but simply as legal heirs of the deceased.

As far as the usufructus in favor of the complainant, the Santo Asilo de las Damas, is concerned, it is not claimed by us, and never was claimed, that it is illegal. We maintain that the complainant is entitled to such usufructus and we always continued to comply with the condition establishing this usufructus, as, under the doctrine of the civil law of real rights, a real right, in so far as it follows the land, even if the land is transferred to third parties, is, so to say, a burden on the estate and is attached to it, and, as such burden, transmitted to any future owner of the estate.

POINT V.

That the cause of action is barred by the statute of limitations, notwithstanding the payment of one-half of the profits to the complainant by the defendant.

We maintain that even in case that the Santo Asilo de las Damas would have been vested with the title and right of possession of the estate of Silva since the death of Dominga Fernandez y Verdes, as claimed by the complainant, that still the defendant, Josefa Diana Martinez, by herself and by her predecessor in title, José Laboy, has been in adverse possession of the said estate for a lengthy period of time, sufficient to have acquired the right of ownership under the laws of Porto Rico by prescription.

Dominga Fernandez y Verdes died on the 15th day of January, 1891. (Page 3, Record, fol. 6.)

Upon her death José Laboy Fernandez took possession of the estate and continued to control and manage the same from the date of the death of the said Dominga Fernandez y Verdes up to the date of his death, on the 13th day of November, 1903. (Record, p. 4, fol. 7.)

Upon the death of the said José Laboy Fernandez, on the date aforesaid, the defendant, Josefa Diana Martinez, entered into possession of said estate and has continued in possession and control of the same up to the present time. (Record, p. 5, fol. 8.)

José Laboy Fernandez believed himself entitled to the estate of Silva as substituted heir, by virtue of the alternative appointment made by the first

heir, Juan Apolinario Laboy. He had, therefore, color of title and he had in his favor the presumption of good faith, if not rebutted by any evidence.

The defendant, Josefa Diana Martinez, had also color of title, as she was appointed by José Laboy as his substitute, and she has also in her favor the presumption of good faith.

Section 437 of the Civil Code of Porto Rico provides as follows:

> "Good faith is always presumed and any person averring bad faith on the part of the possessor is bound to prove the same."

Section 1841:

> "For ordinary prescription of ownership and other property rights it is necessary to possess things in good faith and under a proper title during the time specified by law."

Section 1851:

> "Good faith of the possessor consists in his belief that the person from whom he received the thing was the owner of the same and could convey his title."

Section 1853:

> "By a proper title is understood that which legally suffices to transfer the ownership of property rights, the prescription of which is in question."

Section 1858:

> "Ownership and other property rights in real property shall prescribe by possession for ten years as to persons present and for twenty years with regard to those absent, with good faith and with a proper title."

The sections quoted are from the Civil Code in force in Porto Rico at the present time.

Section 1840 of the same Code provides:

> "Prescription which began to run before the publication of this Code shall be governed by the prior laws; but if, after this Code became operative, the time required in the same for prescription has elapsed, it shall be effectual, even if, according to the said prior laws, a longer period of time may be required."

The Civil Code in existence in Porto Rico before the present Civil Code, in Article 1957, as amended by the Military Judicial Order of April 4th, 1899, reads as follows:

> "Ownership and other property rights in real property shall prescribe by possession for six years, as to persons present or absent, with good faith and with a proper title."

It will therefore be seen that the title to the said estate by simple operation of law has prescribed in favor of the defendant as against the complainant. The circumstance that the defendant has continued to deliver to the complainant one-half of the net profits to which the complainant was entitled by the will does not alter the case in any way, as the

defendant had still adverse possession of the property in every respect, claiming the estate as belonging to the defendant and to nobody else, subject only to the charge of the usufruct in favor of the complainant.

POINT VI.

That the complainant is estopped by its own action from setting up any claim to the ownership of the estate or against the validity of the leases.

The doctrine of estoppel finds a clear application to the case at bar.

Whatever may have been the nature of the transactions leading up to the leases by the defendant Josefa Diana Martinez to the other defendants, still both the original leases and the extensions of the same have always been acquiesced in and consented to by the complainant, who not only did not raise any objection at the time they were made, but had received and enjoyed the benefits derived from those leases.

Evidently this works as an estoppel preventing recovery.

In the case of Kirk vs. Hamilton, 102 U. S., 68, it was said:

> "If a man, knowingly, although he does it passively by looking on, suffers another to purchase and spend money on land under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal rights against such person."

"One who, by his renunciation or disclaimer of a right or title, has induced another to believe and act thereon, is estopped afterwards from asserting such right or title." (60 Cycl., 761.)

"An owner of proper y who stands by and sees a third person selling or mortgaging, under claim of title, without asserting his own title, or giving the purchaser or mortgagee any notice thereof, is estopped as against such purchaser or mortgagee from afterwards asserting his title." (16 Cycl., 762.)

"Where the true owner of property calls out another or allows him to appear as the owner of or as having control of disposition over the property, and innocent parties are thus led into dealing with such apparent owner or a person having such apparent power of disposition, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner which precludes him from disputing, as against them, the existence of title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. The owner of real property may, by clothing another with an apparent title thereto, or with apparent authority over it, estop himself from denying such title or authority." (16 Cycl., 773.)

POINT VII.

Inadequacy of the price paid is not by itself sufficient proof of fraud in the transaction.

In the case at bar there is no proof either of direct or constructive fraud on behalf of the defendants, as the only basis or ground for sustaining a finding of fraud is taken from the inadequacy of consideration for the leases and their extensions. Even admitting that their rentals were inadequate, still we maintain that that fact alone, unaccompanied by any other element of fraud, can not be invoked as a ground to declare said leases void.

It has always been held that inadequacy of consideration by itself does not vitiate a transaction, unless combined with some other evidence of fraud, express or constructive.

> "Inadequacy of consideration is not, of itself, a distinct principle for relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contrary. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. It must be, in its nature, fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to part with it at a particular time. If courts of equity were to unravel all these transactions, they would throw everything into confusion and set afloat

the contracts of mankind. Such a consequence would, of itself, be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief."

Story, Vol. 1, Section 245.
See 10 L. R. A., 606 (Note) on Proof of Fraud.

Conclusion.

It is respectfully submitted that the Court below should be ordered to set aside the decree entered in this case and enter a decree for the appellants, or defendants in the bill of complaint.

Respectfully submitted,

CHARLES M. BOERMAN,
Of Counsel for Appellants.

ADDITION, APPELLANT'S BRIEF.

(To be inserted at page 27.)

The ancient Spanish law on the subject in force at the time at the making of the will in the case at bar is contained in Partida 6, Title 4, Law 3 of the Siete Partidas, and reads, translated, as follows:

"Among the conditions by which men institute heirs for the future there may be such which are impossible because impeded by nature. For example, if the testator say to one: I make you my heir if you reach heaven by your hand. Such a condition will not impede the institution of heirship, as the condition is impossible and we said before that it will stand as not written. The same occurs with all mandates made by the testator with such or analogous conditions. We also say that conditions which are impossible under the law, when put in institutions of heirship or other mandates, do not impede the heirs, although not to be complied with. For example, if the testator say to one: I make you my heir if you will not free your father from captivity or if you will not give him to eat. Such a condition is not valid, so that although not complied with the heir take his inheritance or any other bequest left; and generally are considered impossible under the law all those conditions which are contrary to honesty or good morals or works of piety or natural rights." Article 786 of the Spanish Civil Code of 1889 says as follows: "The nullity of a fideicommissary substitution shall not prejudice the validity of the institution of heirship or the heirs first instituted; the fideicommissary clause will be considered as not written." The Civil Codes of Italy (900), of Portugal (1869) and Mexico (3632) contain the same provisions.

We are aware that the French Civil Code pro-

vides differently in its article 896. But we respectfully submit that in the case at bar, as the will has been made by a Spaniard in a Spanish country, we must go by the Spanish Law and not by any other.

In all other respects as far as fideicommissary substitutions are concerned the French Law is identical with the Spanish Law on the subject. See Code Napoleon, Article 896. Troplong in Droit Civil explique, Donations et testament, Vol. 1, article 90, says that under the French Law fideicommissary substitutions are prohibited. In article 117 he says that even if the prohibition to alienate is not expressed, it is nevertheless a substitution and null under the laws in article 136. Troplong cites: Arret de la cour de Paris of 11 May, 1852, on this subject.

UNDER THE SPANISH LAW THE REMAINDER OF AN ESTATE, IF ANY, GOES IN CASE OF THE ILLEGALITY OF A PERPETUITY TO THE INSTITUTED HEIR AND TO NO ONE ELSE.

In support of this contention we will first cite Escriche: "Diccionario razonado de legislación y jurisprudeñcia" under the word "heredero universal." It says, translated, as follows: "By the decision of the Supreme Court of Justice of the 27th of September, 1845, it was declared that the universal heir has a right with preference against the legitimate heir to the bequests which cannot have effect for some legal impediment, in conformity with the legislation of the 'Partidas,' although we do not mean that the 8th law, title 18, book 10 of the Nóvisima Recopilación is abrogated, which recognized the validity of the bequest in wills in default of the institution of heirship and

which declared that it should go to the heir abintestato, because that law had only as its object to abrogate the disposition of the 'Partidas' which annuls a testament in which there was no institution of heirship in order that the bequest might take effect, but not the disposition which prefers the testamentary heir to the legitimate one in the distribution of those bequests. By the same sentence it has been decided that in case for any legal reason a foundation of the perpetuity be annulled, the same go to the mass of the heirship, also without meaning that the said doctrine were abrogated by law 12, title 17, book 10 of the 'Nóvisima' which declared null and void the vinculaciones or perpetuities, betterments and prohibitions of alienation which may be made in future, and gives the right to the immediate relatives of the testator to reclaim them. This last clause of the law does not mean to say that a bequest by which any perpetuity was unlawfully made and which was therefore annulled, goes to the next relative with preference to the universal heir, but only that the immediate relatives of the testator inherit said bequest in a certain case, that is to say, where there is no universal heir and in preference to the person who was named as a beneficiary of the void perpetuity."

Here are the contents of the said decision resolving about said questions:

In the proceedings of Don Victoriano against Don Gonzalo and Doña Rosalía about reclamation of a house which the defunct Doña Alfonsa left which are now before us by a cassation proposed by Don Gonzalo and Doña Rosalía against the sentence of review pronounced by the Audiencia of this Court of the 6th of May, 1844, by which it was declared that the said house belonged to Don Victoriano without prejudice of any other relative, who may prove greater relationship with Doña Alfonza,

the cause having been heard; considering that law 12, title 17, book 10 of the Nóvisima Recopilación had as its sole object to put an end to any indefinite amortization or perpetuity for which purpose it provided that for its validity there must be a Special Royal Permission at the petition of the interested parties; considering that the words of the said law "with the right to the immediate relatives to first inherit in the ammortized perpetuity without those requisites," cannot be understood except meaning in its case and also, because it was not intended to make new legislation in reference to successions or to abrogate incidentally the one which was in force before; considering that in conformity with this when there is an institution of universal heirship the bequests which were annulled remain in the benefit of the heirship, considering that this is the doctrine stated in the clear laws of the "Partidas"; which were not abrogated by the first law, title 18, book 10, of the Nóvisima Recopliación; considering finally that this doctrine and that laws upon which it is founded were misunderstood by the foresaid sentence of review: We adjudge that the said procedure of the cassation is right and we declare the said sentence without any value or legal effect, and we order that the proceedings go back to the Audiencia for the effects expressed in article 18 in the decree of the 4th of November, 1838, cancelling thereby the obligation made for the cited Don Gonzalo and Doña Rosalía. Decision of the 27th of September, 1845.

So far from Escriche. In the case at bar there was an institution of a universal heirship, as Juan Laboy has been named as the only and voluntary heir, with an obligation of the perpetuity which is void under the law then in existence. Therefore all the property including the remainder must go to him and his successors.

In the decision of the Supreme Court of Spain in the case of Costilla against Llano in Jurisprudencia Civil, Volume 67, page 675, the Court has declared that even if the word heir was not used but only the word "testamentario," or "heredero fideicomisario" that is equivalent to a confidential heirship.

The Court says among other things, as follows: "And Law 8th, title 33, Partida 7th, is well followed by a decision which considers a fideicomiso as universal if the testator mentioned the fidecomisarios as heirs and the fidecomiso for certain foundations was to be a burden upon the whole inheritance without other bequests for deductions than masses and various others.

Now, we want to make clear the difference between what is called in the Spanish law "Sustitución fidecomisaria" and what is called "Sustitución vulgar," or in English, between a trust substitution and a common substitution. The substitution which was made in the will in the case at bar in the provision that Juan Laboy, the first heir, substitute another one in his place, and so *ab infinitum* is a sustitucion fidecomisaria because it has for its object to secure the usufruct of half the income for the benefit of the said Asilo de las señoras Damas de Ponce. But the clause of the will which provides that in certain cases the property shall go to the said Asilo de Damas in case of non-fulfilment of the conditions and so forth, is a simple common substitution or in Spanish, "substitución vulgar," because this is not a trust, but a simple provision that in case the first heir does not comply or for certain other causes another heir shall be substituted. There is no trust instituted or communicated by this provision.

Having made this clear, we will cite the Supreme

Court of Spain for our contention that all the property including the remainder, if any, goes in the case at bar to the first heir and his successors.

In the case of Casaux against Rivero, decided 24th January, 1891, and reported in Jurisprudencia Civil, Volume 69, page 104, the Supreme Court of Spain says as follows: "That the Sustitución vulgar does not take place and is extinguished once the first instituted heir accepted the inheritance, because in that case the motive which gave cause to it fails; which as expressly provided by law 4, title 5, Partida 6 is a necessary condition of the institution. It is defined and regulated by the laws 102 of the same title and partida; which doctrine is applicable to the substitution of this trust with exception if the testator expressly provided to the contrary." In the case of Coromina against Bosch, decided on the 27th of April, 1898, and reported in Jurisprudencia Civil, Volume 84, page 145, the Supreme Court of Spain decides as follows: "That in case a testament provides for a substitution on the condition that the heir dies before coming of age or after 14 years without having made a testament or leaving no issue or such, which will not arrive to the said age, it is clear in case the next heir made a testament, no matter if he had issue or not, the instituted substitution disappears and the inheritance remains to the free disposition of the said heir, whose will expressed in a testament must be respected." The same has been decided in the case of Caparío against Caparío, decided the 7th of March, 1905, and reported in Jurisprudencia Civil, Volume 100, page 487.

It is therefore clear from whatever point of view we may consider the case at bar, that once the imposed conditions are illegal and therefore void and the first instituted heir or his substitute has taken

possession of the heirship and of the inheritance that the full title vested in them for ever against all parties, even against the legitimate heirs of the testator and that no reversion or remainder attached to their inheritance any more.

CHARLES M. BOERMAN,
Of Counsel.

Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 83.

JOSEFA DIANA MARTINEZ, JULIO N. CHARDON, CARLOS CABRERA AND TOMAS TORRES,

Appellants,

vs.

LA ASOCIACION DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE.

ADDITIONAL BRIEF FOR APPELLANT ON QUESTION OF JURISDICTION.

FRITZ v. BRIESEN,
Of Counsel for Appellants.

[illegible]

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1908.

JOSEFA DIANA MARTINEZ *et al.*, Appellants, vs. LA ASOCIACION DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE, Appellee.	No. 83. (No. 312, October term, 1907.)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

ADDITIONAL BRIEF ON BEHALF OF APPELLANTS.

This additional brief is intended to cover only one point, and to present additional authorities and view points to those contained in the main brief filed in this case.

The United States District Court for the District of Porto Rico was without jurisdiction to try this case.

By the Act establishing the government of Porto Rico (Foraker Act, 31 Stat. at L. Chap. 191, Sec.,

34, April 12, 1900) it was provided that "Porto Rico shall constitute a judicial district to be called the district of Porto Rico, * * * the District Court for said District shall be called the District Court of the United States for Porto Rico * * * and shall have in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court."

By the Act of March 2, 1901 (31 Stat. at L., Chap. 812, Sec. 3), the foregoing act was amended,—it being provided that "the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April 12, 1900, extend to and embrace controversies where the parties or either of them are citizens of the United States or citizens or subjects of a foreign State or States wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of $1,000".

The bill alleges that all the defendants below are citizens of Porto Rico (Rec., page 1, fol. 2).

In order therefore to give jurisdiction to the Court below, it was necessary that the complainant be either a citizen of the United States, or a citizen or subject of a foreign State. There is no question but that it was not an American citizen: 23 Op. Atty. Gen. 370, Gonzalez *v.* Williams, 192 U. S. 1; certainly not within the meaning of the above quoted amendment.

The question therefore is whether or not the complainant is a citizen or subject of a foreign country. It was alleged in the bill (Rec., p. 1, Fol. 2) that it is "a charitable corporation organized and existing under the laws of the Kingdom of Spain," and the Court below so found in the following words (Rec. p. 29):

"The complainant is apparently a secular charitable corporation or assocattion organized by a royal decree of the Spanish Crown on November 11, 1863, (2 Leg. Ult. Marina, Rodriguez San Pedro, p. 201)

having its headquarters at Ponce in the Island of Porto Rico, and as appears by letters and certificates from the insular authorities duly authorized to continue business in the Island at and since the time of the filing of the suit."

The defendants by demurrer raised the question as to the citizenship of the complainant (Rec. p. 18).

This demurrer having been overruled, (Rec. p. 19), the same objection was taken by defendants in their answer, (Rec. p. 27, Fol. 50):

"And these defendants further answering allege that complainant is a corporation organized and existing under the laws of Porto Rico, and all the defendants are citizens of Porto Rico."

The Court below held (Rec. p. 29) that the complainant is a citizen of the Kingdom of Spain and cites in support of this decision the alleged charter granted by the King of Spain, in 1863. This alleged charter is a matter of public record (2 Leg. Ult. Marina, p. 201). For the convenience of the Court a translation thereof has been added to this Brief as "Appendix A."

It appears from this alleged charter that the Crown of Spain in 1863 authorized the establishment of the complainant association for the purpose of establishing asylums and schools for poor children for the poor of the district, (Ponce, Porto Rico). By-laws, Art. I. The By-laws (Reglamento) form a part of the alleged charter and received the approval of the crown. Art. 37 of the Civil Code of 1889 provides that the civil capacity of associations is regulated by their by-laws.

Art. III provides that the Society accepts as protector his Excellency, the Governor Captain General of the Island (of Porto Rico). A perusal of the By-Laws will show that the association was established by the Crown *by virtue of the Crown's prerogatives*

and rights within said Island of Porto Rico for the purpose of establishing a local charity within the District of Ponce on the Island. The alleged charter shows that it was granted at the request of ladies of Ponce and contains a statement to the effect that her Majesty the Queen views with approbation the charitable sentiments of the people of Ponce.

It does not appear from the alleged charter that the association is to have headquarters within the Kingdom of Spain proper, or at any other place than at Ponce, and the fact that the alleged charter is published in the collection of charters called "Ultra Marine Legislation" proves conclusively that the Society was to have no more than a local scope.

The following question is placed before this Court:

"*Is a merely local association established within the Island of Porto Rico by the Spanish Crown, by virtue of its sovereignty over such Island, at the present time a Spanish citizen or a citizen of Porto Rico?*"

It is the generally accepted rule that, under the judiciary acts of the United States, the citizenship of a corporation is presumed to be that of the State creating it. It will here be shown that in a case like the present, this rule should not be applied. So far as counsel know this question has never been directly decided, although as will hereafter be shown, it has practically been decided in favor of the present contention in the case of *Dartmouth College* vs. *Woodward, 4 Wheaton, 518.*

The history of the construction of the word "citizen" in the judiciary acts is a very interesting one. A brief review of it is given in the opinion of Mr. Justice Shiras in *St. Louis & San Francisco Ry.* vs. *James, 161 U. S., 545, 554, et seq.;* also in Barrow S. S. Co. *v.* Kane, 170 U. S. 100.

It was at first held that corporations were not citizens:

"That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate is certainly not a citizen; and consequently cannot sue or be sued in the Courts of the United States unless the rights of the members in this respect can be exercised in their corporate name." Chief Justice Marshall in *Bank of the United States* vs. *Deveaux*, *5 Cranch, 61, 86.* It was held, however, in this case that "the Court feels itself authorized * * * to look to the character of the individuals who compose the corporation," (pp. 91 to 92,) and finally decided that the capacity of a corporation to sue in the United States Courts depends upon the citizenship of its members. This rule was approved in *Bank* vs. *Earle*, *13 Peters, 519.*

However, evidently realizing the inconvenience and practical injustice of this doctrine, the Court in *Louisville, etc., R. R.* vs. *Letson*, *2 How., 497*, laid down the rule "that a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State for the purpose of its incorporation, capable of being treated as a citizen of that State." (Page 558.) This rule has been consistently adhered to. (See Andrews' American Law, Vol. 1, Sec. 439, Note 81.) See, for instance, *Marshall* vs. *B. & O. R. R. Co.*, *16 How., 314*, and *Railroad Co.* vs. *Koontz*, *104 U. S., 5.*

It will be seen that the doctrine that, under the judiciary acts, a corporation must be presumed to be a citizen of the State which created it, was based primarily upon the idea, first enunciated over one hundred years ago, that a corporation enjoyed the citizenship of its individual members. As corporations multiplied, and it became more common for citizens of different States to

unite in forming corporations or to become stockholders in corporations, it was made a presumption of law that a corporation was a citizen of the State by which it was created and in which it did business. Mr. Justice Shiras in the case above referred to, 161 U. S., 545, says (page 563) that the Court is unwilling to sanction "an extension of a doctrine which, as heretofore established, *went to the very verge of judicial power.* That doctrine *began*, as we have seen, *in the assumption that State corporations were composed of citizens of the State which created them;* but such assumption was one of fact and was the subject of allegation and traverse, and thus the jurisdiction of the Federal Courts might be defeated. Then, after a long contest in this Court, it was settled that the presumption of citizenship is one of law not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

There is no reason, either in law or necessity, why this doctrine should be applied to a corporation, the members of which, as will be shown, must be presumed to be, not citizens or subjects of a foreign country, but citizens of Porto Rico. "Reason is the soul of the law; the reason of the law being changed the law is also changed." (7 Coke, 7; Bouvier's Law Dict., Tit. "Maxims.")

The plaintiff association, as has already been shown, was created upon the petition of ladies of Ponce, Porto Rico, for strictly local charitable purposes. If it was at the time, and up to 1898, a Spanish corporation, then under the reasoning of the cases above cited, it must be presumed that all of its members were Porto Ricans or, in the broadest interpretation, Spanish subjects. Under the Treaty of Peace between the United States and Spain, signed in 1898 (Art. IX), it was provided that the civil rights and political status of the native in-

habitants of the territories shall be determined by the Congress, although Spanish subjects, natives of the Peninsula, were permitted to retain their Spanish citizenship upon making a formal declaration of their decision to this effect, in default of which declaration they shall have been held to have resigned it and to have adopted the nationality of the territory in which they reside (see Gonzales *vs.* Williams, 192, U. S., 1, 9). Thereupon Congress passed an act, April 12, 1900, creating a civil government for Porto Rico, and provided in Section 7 "that all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico shall be deemed and held citizens of Porto Rico * * * except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the 11th day of April, 1900."

It must, therefore, be presumed that, unless the members of the association were Spaniards of the peninsula and filed the declaration that they are now citizens of Porto Rico, and by consequence that the association, if it be a corporation, must, under the judiciary acts, be held to be, by analogy to the reasoning of the above cited cases, a corporation of Porto Rico. There is nothing in the record to show that the individual members made the declarations contemplated by the treaty or the statute.

We shall now consider the question from another aspect:

The plaintiff association, as has already been shown, was authorized by the Crown of Spain by virtue of the sovereignty residing in said Crown over the island of Porto Rico. It appears from the charter (Appendix A) that the association was not authorized to have any home, habitat, place of business or asylum in any place outside of the island of Porto Rico. See Art. 28, of the Civil Code of 1889, which provides that, while corporations "domiciled in Spain shall enjoy the Spanish nationality," "*asso-*

ciations domiciled abroad shall have in Spain the consideration and the rights fixed in treaties or *special laws*"; and Art. 41, which provides that "when neither the law which has created or recognized them, nor the statutes or rules of their establishment fix the domicile of judicial persons, it shall be understood that it is at the place where their legal representation is established or where they exercise the principal duties of their institution."

This sovereignty now no longer resides in the Crown of Spain, but resides in a body politic created by Section 7 of the Act of April 12, 1900 (31 Stat. at L., 77, Chap. 191), known under the name of The People of Porto Rico. Of course the ultimate sovereignty resides in the United States of America, but such sovereignty, in so far as the immediate status and the status under the judiciary acts in concerned, has been conferred upon this body politic by the aforementioned acts. (See particularly Secs. 8 and 15.)

The People of Porto Rico have therefore entirely supplanted the sovereignty of the Crown of Spain or, as the phrase is, for the purpose of the present inquiry they have "stepped into the shoes of the King of Spain." The authority under which the association does business is therefore now in the hands of The People of Porto Rico. If the association exists at all, it exists only by virtue of the express or implied authority granted to the same by the people of Porto Rico.

It is therefore a citizen of Porto Rico. It owes allegiance to the present government, and may claim protection from it (Cyc. of Law & Proc., Vol. 7, pp. 133, 136, 142, and authorities there cited).

The situation is substantially identical with that which arose under the charter of Dartmouth College and our treaty with England of 1783. Dartmouth College was organized in 1769 under a charter granted by the then King of England, George III, the charter being witnessed by the then Governor of the Province of New Hampshire. The corpora-

tion thus formed did business until 1816 when the State of New Hampshire attempted to amend its charter. This attempt led to the famous litigation which was finally determined by this Court in *Dartmouth College* vs. *Woodward, 4 Wheat. 518.* In its decision, this Court held, page 643, " This is plainly a contract to which the donors, trustees and the Crown (*to whose rights and obligations New Hampshire succeeds*), were the original parties."

The parallel is all the more striking in that at the time of the declaration of the inhabitants, New Hampshire was governed by a Governor and a local legislature of two houses, and at the time of the Treaty of Peace with Spain in 1898, the Island of Porto Rico was governed by a Governor and legislature of two houses, under the Constitution promulgated by royal decree of November, 1897 (an English translation of which has been printed by the Government Printing Office, Washington, 1899). It seems that if the Court below were correct in holding the plaintiff to be a Spanish corporation, then Dartmouth College in 1819, and probably today, would be a British corporation. If the decision below were affirmed, it would seem that it would affect the citizenship of many corporations formed under charters granted by the British Crown prior to 1776. It has been abundantly held that a corporation "can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law and by force of law, and *where that law ceases to operate the corporation can have no existence.* It must dwell in the place of its creation." *Ohio & Mississippi R. Co.* vs. *Wheeler, 1 Black, 286, 295,* citing *Bank of Augusta* vs. *Earle, 13 Peters, 512.* See also *Paul* vs. *Virginia, 8 Wallace, 168, 181.*

It must follow that where the sovereignty that gave it birth passes to or under another sovereignty, the corporations created by the former must become,

in contemplation of law, a citizen or subject of the latter. The authorization in question was addressed to the Governor Captain General of Porto Rico, and was therefore granted under so much of the sovereignty held by tho Crown of Spain as related to the Island of Porto Rico. If the Crown of Spain had had no sovereignty over the Island of Porto Rico, the charter would have been a complete nullity. No State can legally create a corporation for the purpose of having its headquarters and doing its business entirely outside of its jurisdiction. Therefore, if this sovereignty has now been lost, the association can no longer look to it for protection or for a legal fountain of existence, but must look to the new sovereignty, to wit, the United States of America, as represented by the body politic known as The People of Porto Rico.

The case is analogous to that of a territorial corporation when the territory becomes a State. In such case the corporation becomes a citizen of the State.

Kansas Pacific R. R. vs. *Atchison, 112 U. S. 415.*

Attention is further called to the fact that the earlier decisions under which the present doctrine of citizenship was developed, referred to the fact that the corporations in question were not only created by "but did business" or "had a home" in the State of its incorporation.

Louisville, etc., R. R. v. *Letson, 2 How. 497.*

The plaintiff has no home at the present time in the Kingdom of Spain, and does not do business in the Kingdom of Spain.

It is respectfully submitted that although the association was created originally by the Crown of Spain, the defendants below were correct in urging

both by demurrer and by answer that the association does not now "exist" as a Spanish citizen, but is a citizen of Porto Rico, and that, therefore, the Court below had no jurisdiction to hear the case. The case, with all its intricate questions involving a close knowledge of the Spanish law, should have been heard by the Supreme Court of Porto Rico.

The discussion hitherto has been based upon the assumption that the Court below was correct in holding that the plaintiff is a corporation. Now, as a matter of fact, it was not a corporation, but an *association*. Its title and by-laws show this. The Court below held it to be "*apparently* a secular, charitable corporation *or association*" (Rec., p. 29, fol. 54). The Civil Code of 1889 draws a distinction between corporations and associations (see Art. 35), and states, in Art. 37, that "the civil capacity of corporations shall be governed by the laws which have created or recognized them; *that of associations by their by-laws.*"

It will appear from a perusal of the by-laws (Appendix A) that the plaintiff association is

> * * * "a body of persons acting together; without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise."
>
> Cyc. of Law & Proc. Vol. 4, p. 301, Art. "Associations."

The association was regulated, according to the Civil Code, by its by-laws, just as is an association under the laws of the various states of the Union. An association, being only a collection of individuals, could not, in common law, sue by its own name, and an action brought by such an association is necessarily brought in the names of all the indi-

vidual members, except where the common law rule has been modified.

The Civil Code of 1889, Art. 35, *et seq.*, appears to give to the association a judicial personality, so that it may hold property in its own name and bring suit in its own name. However, there appears to be nothing in the Code, or in any of the laws applicable to the situation, which brings such an association within the line of decisions which hold that a corporation may be deemed a citizen of the State creating it.

An association is, broadly speaking, rather analogous to a partnership than to a corporation.

For authorities on these points see the very short chapter on Associations in Cyc. of Law & Proc., Vol. 4, p. 301, *et seq.*

It would, therefore, seem reasonable to conclude that if the plaintiff association may sue as a judicial person its citizenship must be determined by that of its members. Unless the contrary is shown it must be presumed that the association is composed of Porto Rican citizens. As nothing to the contrary has been shown, and the burden of proof lay with the plaintiff to prove its foreign citizenship in order to invoke the jurisdiction of the United States Court, it must follow that the Court below had no jurisdiction in the present case.

New York, January 15, 1909.

Respectfully submitted,

FRITZ v. BRIESEN,
Of Counsel for Appellants.

APPENDIX A.

1863. NOVEMBER 11, 1863.

Royal order authorizing the establishment of an asylum of charity in Ponce and approving the By-laws.

EXCELLENT SIR:

This department has received a letter, #367, of the 10th of September ult., in which Your Excellency gives an account, with copies of documents, relative to the establishment of an asylum of charity in Ponce, at the request of Donna Henrriqueta Vinsch de Prats and various ladies of that city. His majesty, in view of the favorable reports received about this matter, has decided to grant the authorization requested, and to approve the by-laws which accompany the same. At the same time the Queen has requested that Your Excellency be informed that she viewed with pleasure this proof of the charitable sentiments of the people of Ponce—By Royal Order, etc.—Madrid, November 11, 1863—To the Governor Captain General of the Island of Porto Rico.

BY-LAWS REFERRED TO.

CONCERNING THE ASSOCIATION IN GENERAL.

ARTICLE 1. This association recognizes as its principal object the alleviation of human suffering, and for this purpose it will establish an asylum for the poor of the district. When its resources permit it to give its attention to other objects related to its purpose it will establish schools for poor children of both sexes under the supervision of Sisters of Charity.

ARTICLE 2. The society will be under the patronage of Our Lady of Carmen.

ARTICLE 3. The society accepts as protector His Excellency, the Governor Captain General of the Island.

ARTICLE 4. The society will be governed by a Board of Directors which will administer its funds and which will look after its development and progress. This board shall consist of a lady president, a lady vice-president, and six directors, a lady treasurer and a lady secretary.

ARTICLE 5. There shall be in addition four gentlemen directors to assist in the labors of the treasurer and secretary and shall take care of such duties of the asylum which are not compatible with the delicacy of the fair sex.

ARTICLE 6. The Board of Directors shall be elected by the body of charter members, and the renewal of their offices shall be made by a plurality of votes of the Board (?) when a vacancy occurs, but only members of the Ladies of Santo Asilo are eligible.

ARTICLE 7. Members of the Ladies of Santo Asilo shall be all such as desire to become members, and enter their names in the register of the association, fixing monthly alms which they voluntarily desire to contribute to its maintainance, and obligating themselves to lend their personal services when the Board deems it advisable to make use of the same.

ARTICLE 8. The internal duties of the asylum will be confided to Sisters of Charity, when such are available, and their regimen shall be the object of a special set of rules.

ARTICLE 9. Every six months there will be published in a local newspaper a report of the society's finances for the information of the contributing friends.

ARTICLE 10. The Board of Directors shall hold two regular meetings a month, without prejudice to the extraordinary meetings which may be assembled upon the call of the lady president.

ARTICLE 11. A quorum of the board shall consist of one-half plus one of its members: Its resolutions shall be taken by an absolute majority and the president shall have a decisive vote in case of a tie.

ARTICLE 12. In the month of January of each year there shall be a general meeting to which all the subscribing ladies shall be invited and at such meeting an account shall be given of the condition and progress of the institution by means of a written report presented by the Board of Directors.

ARTICLE 13. The office of any lady member of the Board of Directors shall be considered vacant if in the opinion of her associates she has, without any justification, failed to attend the meetings or to attend to the duties imposed upon her by Board of Directors.

THE BOARD OF DIRECTORS.

ARTICLE 14. The Board of Directors shall have the following functions :

1. To fix the number of beds which are to be sustained, as the funds of the asylum will permit, and to grant admission to the asylum to such of the poor who are to occupy them, and who make request for admission either for themselves or for another person. In the latter case, resolutions made by three ladies of the board shall be valid as long as they do not exceed the number of beds fixed by the board.

2. To make contracts which are made necessary by the needs of the institution.

3. To fix the house-rules for the interior conduct of the asylum and to appoint employes and servants which the same calls for, watching over the strict compliance therewith by means of committees appointed from among its own members.

4. To fix the day on which the general meetings are to be held.

The President.

Article 15. The lady president shall have the following functions:

1. Conduct correspondence with the authorities and with individuals; to attest jointly with the lady secretary the resolutions of the Board of Directors, and to see to it that these are complied with as speedily as possible.

2. To preside over all the acts of the association and to issue the necessary call, through the lady secretary, for all ordinary and extraordinary meetings.

3. To attest the monthly receipts for alms and other contributions which the lady treasurer may issue, as also the orders for payment which may be issued by the ladies appointed for this purpose.

4. To issue orders for admission of the sick to the asylum.

5. To decide herself extraordinary and urgent cases, submitting her decisions immediately for the approbation of the Board.

6. To hold one of the two keys which lock the safe containing the funds of the association.

7. To watch over the order and good administration necessary for the progress of the asylum.

The Vice-President.

Article 16. She shall exercise all powers of the president in case of her absence, illness or other legal impediment, until she returns to her post or until a regular president is elected, taking her turn in the meantime with the lady directors in the discharge of the obligations which the house rules assign to her, and also discharging the duties committed to her by the president or the Board.

The Directors.

Article 17. The six lady directors, in the order of their election, substitute for the president and vice-president in the cases provided for in the last article, or in case these ladies cannot take part in the decisions and acts of the association. They shall discharge as quickly as possible the duties entrusted to them by the Board of Directors and the president, or which are laid upon them by the house rules of the asylum, issuing orders for payment which are made necessary by their business, which shall become effective upon approval by the president.

Article 18. The four gentleman directors shall have voice and vote in the meetings and shall be auxiliaries in their respective duties: one to the president, one to the treasurer, one to the secretary, and the last shall be the attorney of the association which he may represent in or out of court in asserting or in defending its rights, first receiving competent power which the Board of Directors will give him when necessary.

These gentleman directors shall also discharge the duties entrusted to them by the board or by the president, and in addition to complying with the by-laws, so far as they concern them, shall take under their special care and charge the policing and keeping order in the room for the male patients, and all such functions of the asylum which are incompatible with the delicacy of the fair sex.

The Treasurer.

Article 19. The treasurer shall have the following duties:

1. To issue the bills for monthly alms and other contributions, and, with the approval of the presi-

dent, collect them by means of the bill collector of the house.

2. To guard in her house the safe which contains the funds of the establishment, and to keep in her possession one of the two keys which lock the same.

3. To render accounts of the expenses and receipts of the funds of the association.

4. To make a statement, on the last day of each month, of the cash and securities and transmit such statement to the president.

5. To pay the vouchers which each lady issues in carrying out her duties, and which have the approval of the president, as well as the warrants which she will draw, authorized by the secretary, by virtue of the business entrusted to her by the Board.

6. To comply with the obligations assigned to her by the house rules, and to attend to such duties as the Board or president may lay upon her and are not incompatible with the duties aforementioned.

7. To help the secretary in drawing up the annual report, referred to in Article 12, furnishing her with such data as are within her power.

The Secretary.

Article 20. In addition to the obligations imposed upon the lady directors the following shall be exclusively hers:

1. To keep a general register of the members of the Damas del Santo Asilo and another of such other charitable persons, who, without being such members, contribute monthly with their alms to the pious purposes of the institution.

2. To keep a minute book which she shall sign with the president.

3. To authorize with her the warrants for paying

what the president has spent in the discharge of the duties laid upon her.

4. To send out and sign the summons for ordinary meetings, and for such extraordinary meetings as the president may deem advisable, as well as to attend to the official correspondence with the authorities and private persons, which however the president is to sign.

5. To prepare the annual report referred to in Article 12, using for this purpose the data furnished by the treasurer.

.....

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR PORTO RICO.

I, JOHN L. GAY, Clerk of the aforesaid Court, do hereby certify that the foregoing six pages are truly copied from Vol. 2, pages 201 to 203 of a book titled "Legislacion Ultramarina" concordada y anotada por D. Joaquin Rodriguez. San Pedro.—Madrid, 1865.

Witness, my official signature and the seal of said Court at Ponce, P. R., this 1st day of December, 1908.

JOHN L. GAY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 83.

JOSEFA DIANA MARTINEZ, JULIO N. CHARDON, CARLOS CABRERA, AND TOMAS TORRES. APPELLANTS,

vs.

LA ASOCIACION DE SENORAS DAMAS DEL SANTOS ASILO DE PONCE.

BRIEF FOR APPELLEE.

Statement.

FIRST.

General Analysis of Record.

Juan Bautista Silva, a citizen and resident of Porto Rico, and a bachelor, living near the city of Ponce, died on the 15th day of May, 1875, having on the 17th day of September, 1873, made and published his last will and testament which, after his death, was duly proven and put to record. By this will (Rec., pp. 49

to 53, incl.), after providing for his burial, the saying of certain masses, the distribution of a small fund among certain of the poor of the District of Ponce, he bequeathed to the two emancipated daughters of his slave Carmen, certain lands and personal property, and then, as he lacked forced heirs and had the right of disposing of his entire estate, he made disposition of his remaining properties in the following words (Rec., pp. 51, 52, 53):

> "all my other remaining property composed of lands, animals and debts in my favor which I have mentioned, that they be delivered and that my good friend Dr. Juan Apolinario Laboy of Ponce take possession of same, who is deserving of all my confidence since long ago, serves and attends to me in my illness disinterestedly, who I appoint and institute as my sole and only voluntary heir to said estate *during his life* under the distinct conditions that I impose on him, as hereinafter shall be stated.—First: That the net usufruct from said estate after paying the municipal taxes and others imposed for the same purpose, be divided in equal parts, one portion for said heir Laboy as a just recompense for his good administration and zeal for said interests, and the other portion to attend to the poor sick of the Santo Asilo de Caribad de las Damas at Ponce which liquidation of products and delivery of this part shall be executed at the end of each year by the same heir appointed administrator, without any other foreign intervention or interference of any kind whatever, as a duty to be performed by the dictates of conscience, and because the product of such properties as I leave depend more or less on the different seasons of the year being favorable or not and that the

rain fail not in the district. Second: As whereas it is my special object that my estate be not dismembered or divided, which has cost me so much privation and work, at the death of Laboy that it pass under the corresponding inventory and full statement of all the properties into the power and possession of the person who shall deserve the confidence of the said Don Juan Apolinario Laboy who shall have the same power and privileges and for the same object hereinbefore mentioned, for which object at the moment that in reason of my death he shall enter into possession of my estate he shall necessarily execute in due form his final will and testament wherein he shall determine the person who shall succeed him in said charge or trust, whose power of substituting which I grant for such object unto Laboy shall be transmitted by the latter, as I have said before, to a person having his confidence, and by him to a person deserving his confidence and so on successfully always by virtue of testament executed by them successively at the very moment that they shall be put in charge as substitute heir, and Third: That if in reason of this condition of this substitution not being complied with opportunely as I have recommended, if by reason of any claim of my relatives or strangers to me, or for any other reason or claim it should be wanted to have it or suppose it vacant or unbequeathed by will the said heirloom or otherwise the estate which constitutes same, I wish and it is my will that in the latter case, and at the death of the said Laboy, my first heir, that said estate be transmitted unto the said Santo Asilo de Damas at Ponce which I appoint as my substitute heirs, most especially recommending in this case to this association

> that said estate be preserved as far as possible under good administration and that only the net product obtained from same be employed in helping the poor sick of the said establishment."

After appointing Dr. Laboy administrator, and annulling any former wills made by him, the testator continues:

> "At this same act, and before closing this execution, I, the testator, declare, ordain and command that in case the inheritance should come to the Santo Asilo de Ponce as I foresee in the third condition of article six of this my will and testament, if for any reason there shall not exist or should this same charitable establishment disappear then the said inheritance shall be inherited under the same conditions and empowerments by the Instituto de Segunda Ensenanza of Ponce, and when this unfortunately shall not be in existence, the said inheritance shall fall to the work or establishment most deserving and in most need of the said town of Ponce, as I was born in said district and all my best wishes are in favor of same, and under no circumstance shall it be employed outside of the district under no pretext whatsoever or for any reason."

Dr. Laboy took possession of the estate devised, complied with the terms of the will as to payment of income to appellee, and a short time after the death of the testator, also observed the provision of the will as to his successor by making an instrument in which he named his wife, Dominga Fernandez Verdez.

He further provided in this instrument that in case of her death before qualifying, his foster son, then a boy some fifteen years of age, should be her substitute.

Dr. Laboy died in 188-, his wife succeeded to the estate, complied during her life with the requirement of the will as to payment of one-half the net income to appellee, but she died in January, 1891, having failed absolutely to discharge and keep the provision of the will as to the naming of her successor by a testament executed by her at the time she succeeded to the possession of the property. She had, however, in 1869, six years prior to the death of the testator Silva, made her own will, in which she named as her universal heir her foster son, Jose Laboy y Fernandez.

Upon the death of Dominga Fernandez y Verdez, the said Laboy, claiming possession under the will of his mother, executed in 1869, took possession of the property and immediately executed a paper wherein he named his wife, the appellant Josefa Diana Martinez, as his successor, and attempted to confer upon her the powers conferred upon himself by the will of his foster father when he named him as substitute heir should Dominga Fernandez not be living at the date of the death of Dr. Laboy.

Jose Laboy died in November, 1903, and upon his death appellant Martinez seized possession of the estate. During his life the younger Laboy made leases of certain of the lands devised by the testator Silva, of which leases appellee had notice, and under same appellee received its share of the rentals, but a short time before the death of Laboy he renewed several of these leases for long periods, beginning at the end of their existing terms, several years in the future, and running for long periods of time, some of them extending as late as the year 1919. These leases were

made at ridiculously low rentals, were made without the knowledge of appellee, and the appellant or Jose Laboy accepted their half of these rentals in advance, and at times even discounted their share for cash in hand, leaving the portions due the appellee unpaid.

After the death of the younger Laboy, his widow, the appellant Martinez, extended leases without notice, then obtained in her individual name, in *ex parte* proceedings, a possessory title to some of these lands, and afterward attempted to secure a title of dominion, but appellee, having been informed of these later proceedings, intervened and the court denied the application. In 1904 she ceased making any payments to appellee.

In July, 1905, appellee filed its bill of complaint against appellant Martinez and her co-appellants, Julio N. Chardon, Carlos Cabrera, and Tomas Torres, lessees of the lands in controversy, and this appeal involves the consideration by this court of the correctness of the action of the District Court of the United States for Porto Rico, in sustaining the claim of appellee—

> (*a*) to the control, possession, and full ownership of these lands, and in vesting in appellee the title in fee simple to the same;
>
> (*b*) in adjudging that appellee is the owner and entitled to possession of certain personal property;
>
> (*c*) in holding and decreeing null and void and cancelling leases made by Jose Laboy or appellant Martinez to her co-appellants, and directing the lessees to pay sums of money to appellee as rent for said lands during certain periods of their holding of same;

(*d*) in holding null and void the original lease made by appellant Martinez to her co-appellant Chardon, and

(*e*) in adjudging that the possessory title obtained by appellant Martinez to certain described portions of these lands was obtained by fraud was null and void, and directing the said possessory title to be cancelled in the registry of property.

Analysis of Bill of Complaint.

The complainant below, appellee here, the Asociacion de Senoras Damas Del Santos Asilo de Ponce, sets forth in its bill of complaint (Rec., pp. 1 to 13, incl.)—

(*a*) that it was a charitable organization, organized and existing under the laws of the Kingdom of Spain;

(*b*) that under the provisions of the will of Silva, heretofore referred to, it was entitled to the full possession and complete title to the estates of the said Silva from the date of the death of Dominga Fernandez Verdez, from the 15th day of January, 1891, on which date she died, for the reason that she had failed to execute an instrument naming her successor in the management and possession of the estate, and that neither Jose Laboy nor the appellant Josefa Diana Martinez had any right or title to the property, and that the same had been wrongfully and fraudulently taken possession of and held by them;

(*c*) that the appellant Martinez was fraudulently holding possession of said property, refusing to recognize the rights of appellee to even half of the net income, and that leases had been

made of portions of the property for long terms for thoroughly inadequate rentals;

(*d*) that appellee was appropriating to herself the assets of the estate and had obtained fraudulent and possessory title to nearly all of the real estate in controversy, and had attempted to secure a dominion title;

(*e*) that the lessees were charged with notice of the want of title in said Jose Laboy and appellant Martinez, and that the rentals fixed were so unreasonable and low that the contracts of lease were evidently fraudulent, and therefore null and void, and had been so from the date of making;

(*f*) that appellant Martinez had in her possession certain mortgage notes and other property belonging to the estate of Silva, to which appellee was entitled.

SECOND.

Analysis of Answer.

A demurrer was filed by defendants to complainant's bill, and this being overruled by the court (Rec., pp. 18, 19) defendants filed a plea (Rec., p. 20) which was overruled by the court *pro-forma* (Rec., pp. 20, 21), and thereupon answer was made by the defendants jointly (Rec., pp. 22 to 28, incl.).

The defendants claimed—

(*a*) that Jose Laboy became entitled to all the property left by Dominga Fernandez Verdez as her universal heir; that this included the estate of the decedent Silva; that said estate was simply affected by right of *usufructus* in favor of appellee; that the conditions of the will of

Silva with regard to the naming of a successor had not been violated; that said condition was originally null and void by reason of the laws existing at the time said will was made, because under these laws perpetuities were forbidden;

(*b*) that Jose Apolinario Laboy took possession of the estate of Silva, with the right to dispose of same by any act *inter vivos* or *mortis causa*, as the right of *usufructus* in favor of appellee was protected by being attached to the land;

(*c*) that the clause of the will with regard to the appointment of a successor by an instrument duly made was limited to the first taker of the estate under the will, Apolinario Laboy;

(*d*) that the possession and control of the property by appellant Martinez was not wrongful or fraudulent, and that the complainant was estopped from denying the appellant Martinez right of possession and control because they had accepted and received certain sums from her and from Jose Laboy as its share of the income of the estate;

(*e*) defendant Martinez admitted that she did obtain by judicial process a possessory title to said estates, but that she acted in good faith, recognizing the rights of appellee;

(*f*) that the rents agreed upon were reasonable at the time of the execution of the leases, and that the lessees had due notice of the fact that Jose Laboy, or appellant Martinez, had no power to execute the same;

(*g*) that the lease made to Chardon was made without notice that said Jose Laboy had no legal power to execute same, but that since the filing of the suit, appellee had entered into a contract with Chardon, wherein it was stipulated that if

> appellee should be successful in this litigation that it would make and execute a lease in favor of said Chardon to the same tract of land.*

And, lastly,

> the defendant Martinez claimed that the action was barred by the statute of limitations, for the reason that she and her predecessor in title had been in possession of the property more than ten years before the filing of the bill.

Analysis of Opinion, Decree, and Statement of Facts.

Replication was made to the answer, and the cause being tried before the court by consent of counsel, without the intervention of examiner or master, the court handed down on February 8, 1907, its opinion (Rec., pp. 29 to 40, incl.), on February 25, 1907, entered final decree (Rec., pp. 41 to 44, incl.), and a statement of facts filed April 4, 1907 (Rec., pp. 49 to 55, incl.).

In the first paragraph of the final decree (Rec., p. 41) the court states that it embodied its findings of fact and conclusions of law in the opinion filed on the 8th day of February, 1907. Therefore, we presume the facts stated in that opinion, as well as in the formal statement of facts, will be considered by the court.

In both the opinion and the decree every contention of complainant below, appellee here, was sustained. The court held distinctly that appellee had, on the 15th day of January, 1891, and still has, full legal power and capacity to receive and hold the property devised

* NOTE.—On page 35 of the record it appears that appellant Chardon, during the litigation, had agreed with the complainant, now appellee, to increase the rental of the 400 cuerdas he held from $240 per annum to $1,350 per annum, and on these terms the agreement was made.

by the decedent; that the trust terminated upon the failure of any trustee to nominate a successor in the manner specified in the will, and that upon such failure the legal title to the property passed to appellee and merged in its beneficial interest; that the legal title to all this property had been by operation of law vested in appellee since the death of Dominga Fernandez Verdeż on January 15, 1891; that the possessory title obtained by appellant, Josefa Diana Martinez, to two pieces of the property was null and void and should be cancelled; that the leases of appellants Cabrera and Torres were null and void because executed without authority, for an insufficient consideration, and with full notice of the interest of appellee in the property; that the possession of appellant Chardon was valid because of an agreement made between him and appellee after the institution of this suit; that the leases of appellants Cabrera and Torres should be cancelled, and that they should pay to the appellee certain fixed sums as rental for the lands occupied by them from the beginning of their leases until March 1, 1907.

The court held that appellant Martinez took no title by adverse possession, and that appellee was not barred by the statute of limitations from prosecuting its action to recover this property.

The facts as found both in the statement and in the opinion, we submit, fully sustain the decree entered.

Under the law and the decisions of this court these findings of fact the District Court are conclusive. Section 34 of the act of Congress of April 12, 1900, commonly called the Foraker act, creates a judicial district to be called the District of Porto Rico, with a

district court to be called the District Court of the United States for Porto Rico, and provides for the appointment of a judge, attorney, and marshal for this district, and in section 35 regulates the writs of error and appeals from the final decisions of this new court as follows:

> "That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations, and in the same cases as from the Supreme Courts of the territories of the United States."

Section 2 of the act of Congress of April 7, 1874, concerning the practice in territorial courts and appeals therefrom, 18 Stats. at Large, at pages 27, 28, provides that—

> " The appellate jurisdiction of the Supreme
> " Court of the United States over the judgments
> " and decrees of said territorial courts in cases
> " of trial by jury, shall be exercised by writ of
> " error, and in all other cases by appeal accord-
> " ing to such rules and regulations as to form
> " and modes of proceeding as the said Supreme
> " Court have prescribed, or may hereafter pre-
> " scribe, provided that on appeal, instead of the
> " evidence at large, a statement of the facts of
> " the case in the nature of a special verdict,
> " and also the rulings of the court on the admis-
> " sion or rejection of evidence, when excepted
> " to, shall be made and certified by the court
> " below, and transmitted to the Supreme Court,
> " together with a transcript of the proceedings

> " and judgment or decree, but no appellate pro-
> " ceeding in said Supreme Court heretofore
> " taken upon any such judgment or decree shall
> " be invalidated by reason of being instituted
> " by writ of error or by appeal."

In the case of Harrison *vs.* Perea, an appeal from the Supreme Court of the Territory of New Mexico, 168 U. S., at page 323, this court said:

> "Our further examination must proceed upon the finding of facts as made by the court below, for this being an appeal from the Supreme Court of a territory, those findings are conclusive upon this court. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment."

The plan adopted by testator is neither unusual nor is, we conceive, contrary to law, whether civil or common. His desire is to establish a foundation to exist for all time for the benefit of the indigent sick of his neighborhood. He selects his friend and physician and commits to his custody and charge his entire estate as such foundation. The terms of the holding are fixed or, as the will states it, "under the distinct conditions that I impose on him as hereinafter shall be stated."

These conditions are clear and distinct (*a*) as to the nature of the holding, it being a trust or charge; (*b*) as to the compensation to be retained by the trustee; (*c*) as to the beneficiary and its rights; (*d*) as to the appointment of a successor by the original trustee, and

the appointment by this successor of one to follow him, and so on.

As to the vesting of the entire estate in a beneficiary, the appellee, should there be a failure in the line of successorship, as provided for in the will, and such failure being caused by any trustee neglecting to name, in the manner required, his successor, it is true that conditions which defeat estates are looked upon by the courts with disfavor, but a condition such as we find in this will does not defeat an estate, but in fact completes the full vesting in the chosen beneficiary. The beneficial interest merges into absolute title.

Even if under the law in force in Spain and her possessions when this will was made or probated appellee could not legally take or hold this property, we insist that advantage cannot be taken of this by appellant, but such advantage should be taken by the state or the heirs at law of Silva. In no way did the crown or insular authorities, or the heirs at law of Silva, from 1875, the date of the probate of the will, to 1898, the date of our occupancy of the island, question the legality of the disposition made by Silva of his property, or question the right of appellee to receive annually one-half of the net income of this estate.

ARGUMENT.

FIRST.

The court below clearly had jurisdiction.

The question of jurisdiction presented by the demurrer of defendant, now appellant, to the bill of appellee, was decided by the court adversely to the contention of appellant.

The first ground presented in the demurrer was that the District Court had no jurisdiction because all of the parties named in the bill were citizens of Porto Rico.

In the order overruling the demurrer (Rec., p. 19) appears the following language:

> "The first and third grounds of demurrer were so obviously frivolous that they were abandoned by counsel for the defendants at the argument."

The first ground, however, is presented and argued to this court with seeming confidence of its rightfulness.

Under the act of Congress of March 2, 1901, 31 Stats., 953, it is provided that

> "the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April 12, 1900, extend to and embrace controversies where the parties, or either of them, are citizens

> of the United States, or citizens or subjects of a foreign state or states."

The appellee is a corporation created by and organized under a royal decree of the Spanish crown, issued in 1863. It is not a corporation created and existing by and under any local laws in force or in operation in the island of Porto Rico before or at the time of its creation. It is a corporation existing by royal decree, and not under local statutes or law. It is a foreign subject and is not a citizen of Porto Rico, and this seems to have been found as a fact by the District Court. The respondents are all citizens of Porto Rico, the court finds (Rec., p. 30), and doubtless the court sustained its jurisdiction because the complainant, now appellee, was a foreign corporation.

The Foraker act of April 12, 1900, provides that

> "all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico; and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the crown of Spain on or before the 11th day of April, 1900, in accordance with the provisions of the treaty of peace between the United States and Spain, entered into on the 11th day of April, 1899."

Article 8 of said treaty provides—

> "and it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any

respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private, establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals of whatsoever nationality such individuals may be."

The law has made the fullest provision for the protection of the property of private individuals and of corporations within the ceded territory. It has also provided a clear method by which the Spanish resident of Porto Rico could retain his allegiance to the crown, although continuing his residence in the island, but there is no provision of law, so far as we have been able to discover, under which a corporation created by the crown, located and owning property in Porto Rico, could by any court procedure become a resident local corporation of the island and in this way destroy its corporate allegiance, as it may be termed, to the crown. In other words, the law does not declare that a corporation created by royal grant, and existing in Porto Rico, shall become a citizen of Porto Rico, unless before the 11th day of April, 1900, it elected to preserve its allegiance to the crown.

SECOND.

What Was the Intention of Testator?

It is fundamental law that in the interpretation of wills the intention of the testator will be sought after and must control, if not inconsistent with established law or with public policy.

> "If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against, and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books, as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect."
>
> Inglis *vs.* Trustees of the Sailors' Snug Harbor, 3 Peters, at page 113.

Article 675 of Walton's translation of the Spanish Civil Code in force in Porto Rico when the island was acquired is as follows:

> "Every testamentary disposition shall be understood in the literal sense of its words, unless it clearly appears that the will of the testator was otherwise. In case of doubt, that which appears nearest in accordance with the intent of the testator, according to the tenor of the same testament, shall be observed."

Section 683 of the Civil Code of Porto Rico, adopted in 1902, carries forward virtually without change this

old Spanish declaration with regard to the necessity of construing a will in accordance with the intention of the testator, so that both Spanish and American authorities agree as to the necessity of seeking after the primary intention and purpose of the testator, and allowing that intention to control where possible.

The dominant controlling purpose of Juan Bautista Silva declared in distinct and benign terms in his will was to devote his estate, the product of "much privation and labor," to the "poor sick" of his own neighborhood, the town of Ponce, "as I was born in said district, and all my best wishes are in favor of same."

He selects and designates his friend Dr. Laboy, "deserving of all my confidence," to take charge of this estate "*during his life*," and the net income of the property to be divided equally between Laboy and appellee, selected to distribute this fund among the poor sick under its immediate care and keeping.

The portion to be retained by Laboy is to be retained, in the language of the will, "as a just recompense for his good administration and zeal for said interests."

The testator fixes the amount of compensation to be paid to the manager or administrator of the estate, but in such way as to urge and incite fidelity and industry in the execution of the trust by making the amount of the compensation of Laboy and his successors depend upon the annual net earnings of the estate, and at the same time, with forethought and wisdom, he safeguards the interests of appellee representing the "poor sick," the real objects of testator's bounty, by making it an equal participant in the result of the trustee's or manager's fidelity and industry.

He provides for a continuation of this management by requiring Laboy to execute, when he entered into possession of the estate, his final will and testament, in which he shall name his successor "in said charge or trust" and Laboy to transmit this same power to his successor, and so on successively, always, however, by virtue of a testament executed successively at the very moment each successor shall be put in charge of the estate as substitute heir.

Then, foreseeing a possibility of this condition of his will as to substitution or successorship in management not being complied with, he provides expressly:

> "That if in reason of this condition of this substitution not being complied with opportunely as I have recommended, if by reason of any claim of my relatives or strangers to me, or for any other reason or claim it should be wanted to have it or suppose it vacant or unbequeathed by will the said heirloom or otherwise the estate which constitutes same, I wish and it is my will that in the latter case, and at the death of the said Laboy, my first heir, that said estate be transmitted unto the said Santo Asilo de Damas at Ponce which I appoint as my substitute heirs, most especially recommending in this case to this association that said estate be preserved as far as possible under good administration and that only the net product obtained from same be employed in helping the poor sick of the said establishment" (Rec., p. 52).

He urges appellee to see to it that the estate be preserved under good administration, and only the net product be employed in helping the poor sick, but he does not forbid sale or alienation of his realty.

Again, foreseeing the possibility of the condition as to the appointment of a successor to Dr. Laboy, or to one of his successors, not being obeyed, and thus the passing of the entire property absolutely to appellee, he provides that if at that time appellee should not be in existence, the estate should devolve on another institution at Ponce.

The declared intention, purpose, and desire of the testator was, through appellee or some similar institution, to succor and aid the sick poor of his native district. To him the personal recipients of his bounty would necessarily be strangers. It was human suffering and not the suffering of any distinct individual that appealed to his sympathy, and this gift is based on the broadest foundation of human sympathy. As this court has said:

> "It is no charity to give to a friend. In the books, it is said the thing given becomes a charity where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field, for the needy and passing stranger."
> Fontain *vs.* Ravenel, 17 Howard, page 384.

There is no uncertainty as to the class to be benefited nor as to the instrument through which his bounty should be administered. It is a gift of charity in its highest sense, a gift to alleviate and administer to human suffering within a defined area, regardless of who may be the sufferers.

In considering an instrument creating a public charity the ordinary rules of construction apply in order to determine the intention of the testator, yet when it is

once determined that the donor intended to create a public charity very different rules will be applied from those recognized in establishing and administering private trusts, in order to give effect to the intention of the donor and establish the charity.

That relief of the sick poor of a community is a charitable use cannot be questioned, and in construing a will creating a charitable gift the Supreme Court of Massachusetts, speaking through Justice Gray, said:

> "This bequest is to receive such an interpretation, if possible, as will carry out the intention of the testator. A charitable gift, above all others, is to be so construed *ut res magis valeat quam pereat*. As Lord Chancellor Chelmsford said in the most recent case in the House of Lords upon the construction of general charitable bequests, 'If there are two meanings of a word, one of which will effectuate and the other will defeat the testator's object, the court is bound to select that meaning of the word which will carry out the intention and objects of the testator.' Whicker *vs.* Hume, 7 H. L. Cas., 154. And it is not for this court to forget that the constitution of Massachusetts declares (in words which may be supposed to have been in the mind of this testator when he framed his will) that 'it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to countenance and inculcate the principles of humanity and general benevolence, public and private charity.' Constitution of Massachusetts, c. 5, sec. 2."
>
> 11 Allen, at pages 454, 455.

> "It is said that courts look with favor upon charitable gifts, and take special care to enforce

them, to guard them from assault, and protect them from abuse. And certainly charity in thought, speech and deed challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory; and an inspired apostle exhausts his powerful eloquence in setting forth its beauty, and the nothingness of all things without it."

Perry on Trusts, 3rd edition, sec. 687.

In Russel *vs.* Allen, 107 U. S., at pages 166, 167, this court said:

"By the law of England from before the Statute of 43 Eliz., ch. 4, and by the law of this country at the present day (except in those States in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and, more recently, in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed."

In McDonogh's Executors *vs.* Murdoch, 15 Howard, at page 403, this court, in considering the will of John McDonogh, deceased, says:

"We must look to the conveyances he has made in the instrument, the objects they are fitted to accomplish, and the agencies, if any,

> to be employed, and endeavor to frame these into a consistent and harmonious plan, accordant with his leading and controlling intentions. In reference to his controlling purpose there can be no mistake. He says 'that the first, principal, and chief object' in his view is, 'the education of the poor' of the two cities. With equal emphasis and precision he has disclaimed the desire of building the fortunes of his natural relations. He says 'that even to his children, if he had them (as he has not) and a fortune to leave behind him, he would, besides a virtuous education, to effect which nothing should be spared, bequeath to each but a very small amount, merely to excite them to habits of industry and frugality, and no more.'
>
> "His ruling purpose had no connection with the poor of any one generation. His desire was to establish a foundation to exist for all time, a perpetuity."

In the case at bar, the testator designates the holding of his property by his friend Laboy and his successors as a charge or trust, and he declares the nature, character, and extent of the estate taken by Laboy and those succeeding him the agencies that he employs in his establishment of a foundation to exist for all time for the sustenance and comfort of the poor sick of his locality. And we submit that under the will of this pious Spaniard, a charitable gift is established, and that therefore it is the especial duty of the court to guard it from assault and protect it from abuse, and that this gift to appellee will be sustained unless clearly inconsistent with established law, unless under the law appellee is without legal right to receive and hold the es-

tate and devote it to the purposes declared, or unless it is barred or estopped by its own negligence or laches from now prosecuting its claim.

In the case of Ortega *vs.* Lara, 202 U. S., at pages 342, 343, this court, speaking through the Chief Justice, said:

> "By the general rule of public law, recognized by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new government. Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States so far as applicable would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue.
>
> "Nevertheless, and apparently largely out of abundant caution, the eighth section of the act of April 12, 1900, provided: 'That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

The learned judge before whom this case was tried, at page 37 of the Record, says:

> "Whatever may be the rule in Spain at the present time with reference to this sort of gift,—and we contend that it is the same as it is in the several States of the Union, and does not prohibit the same, we are of opinion that the general policy of the Government of the United States must now apply, unless the local law supervenes to prevent, which we do not think is the case."

We will argue and insist that no local law "supervenes to prevent," and that in view of the general policy of the United States with regard to protecting and upholding gifts devoted to public charities, the burden rests on appellant to show beyond question or doubt the existence of such a local law and its applicability to the case at bar.

THIRD.

Appellee Not Prohibited under Spanish Law from Receiving This Bequest.

At page 23 of brief for appellants we find this statement:

> "We never intended to claim, and never did claim that the complainant herein, Santo Asilo Delas Damas, was prohibited from receiving any charitable or any kind of bequest under the law of perpetuities and mortmains. Under the Spanish law by us quoted there is no such prohibition to bequeath any estate to a charitable institution, unless the will should prohibit any

> further alienation, which clause, by the way, would be void in a will instituting any person as heir, and not only a charitable institution."
>
> "It is not the fact that this complainant is a charitable institution that we ever pointed out as a defense in the case at bar. The complainant is perfectly able to take any bequest or legacy or devise under the laws of Spain, and we never attacked the right of the complainant."

There may be some question as to the legal correctness of this statement. There may be some doubt as to whether the testator could have devised his real estate directly to appellee without it being subjected to certain conditions with regard to sale of same.

Decree XXXVIII, of September 27, 1820, promulgated October 11 of the same year, Decretos de las Cortes, vol. 5, pages 145-149, provides as follows:

> "Article 15. No churches, monasteries, convents, and whatever other ecclesiastical societies, whether secular or regular, hospitals, charitable institutions, homes of mercy or educational institutions, brotherhoods, sisterhoods, fraternities, commanderies, and whatever other permanent establishments, either lay or ecclesiastical, known as mortmains, can acquire in future any real or immovable property in any part of the monarchy either by will or donation, purchase, permutation, confiscation of emphyteutic rents, payment of revenues due, or by any other lucrative or onerous way.
>
> "Article 16. Mortmains cannot impose or acquire in future for any reason, an interest on ground rents of whatever nature which are imposed on real property, nor impose or ob-

> tain tribute or other kind of lien on said property, whether it consists in the loan of a certain sum of money, or part of the products, or for any services in favor of mortmains, or any other annual tributes."

Article 26 of the laws of 1855, Coleccion Legislative de Espana, vol. 65, 1855, pages 5-6, 10, provides:

> "The properties donated and willed or which may hereafter be donated or willed to mortmains and which the latter might accept in accordance with the laws in force, shall be placed on sale or redeemed, as provided by the present law, as soon as they are declared to be the property of any of the corporations mentioned in article 1. (Article 1 includes brotherhoods, charitable and religious institutions.")

So far as we have been able to trace these laws, they were still in force at the time of the death of the testator herein, though they had been modified by enactments of later years, including the law of 1855, and they had been fully considered and construed by the Spanish courts in decisions handed down. Under those decisions, which would be quoted in full were it not for the admissions made in brief of appellant, it is very clear that although the law of October 11, 1820, reestablished by the law of 1856, prohibited mortmains from acquiring real estate or immovables, yet under the law of 1855 charitable institutions were expressly authorized to acquire real property, although upon condition of investing the entire proceeds of the sale into public securities. These cases had been decided before the writing and execution of the will herein,

and it is suggested that by reason of the knowledge of existing law and the court decisions construing same, the testator preferred to devise his property for life to Dr. Laboy, and then to succeeding holding trustees, rather than devise it directly to appellee, for fear that a sale of same would immediately thereby become necessary.

Reference is made by counsel for appellant to certain provisions of the Spanish Civil Code in force in the Island of Porto Rico at the time of its occupation by the United States. But the court will remember that this code went into effect in 1889, fourteen years after the death of the testator.

It is clear, under the provisions of this Code, articles 35 and 38, Walton's translation, that the appellee is now a juridical person, and can acquire and possess property of every class, but we find no reference to any statutory enactment different from those cited.

But whatever may have been the controlling reason, the language of the will is distinct and positive. And though Dr. Laboy is appointed and instituted as the sole and only voluntary heir of the estate, yet it is during his life and under certain distinct conditions with regard to the net usufruct or income of the estate. To accept the reasoning of counsel for appellant, we must look alone at the words "who I appoint and institute as my sole and only voluntary heir to said estate," disregarding absolutely other clauses and language, which show distinctly that the holding was for life, under certain fixed conditions, with the intention on the part of the testator not only that one-half of the profits of the estate should pass to appellee, but that under

certain circumstances the entire estate should vest in it, and if not in existence, then should vest in a similar institution, located at Ponce.

We do not find any basis for the argument on behalf of appellant that the testator Silva intended to make Laboy the real heir of his estate, and the reversion to appellee was limited to a reversion to occur at the death of Laboy without the naming of a substitute by him.

The language of the will is perfectly clear with regard to the appointment of successors by Laboy, and those following him, and then perfectly distinct as to the passing of the estate to appellee should any successor of Laboy fail to comply with the requirements of the will as to the naming and appointment of his own successor. The will says:

> "That if in reason of this condition of this substitution not being complied with opportunely as I have recommended, if by reason of any claim of my relatives or strangers to me, or for any other reason or claim it should be wanted to have it or suppose it vacant or unbequeathed by will, the said heirloom or otherwise the estate which constitutes same, I wish and it is my will that in the latter case, and at the death of the said Laboy, my first heir, the said estate be transmitted unto the said Santo Asilo de Damas at Ponce which I appoint as my substitute heirs."

As we understand this language, the testator directs, first, that if there be a failure to comply with the condition of substitution, then the estate to pass to appellee, or if by reason of any claim of relatives or strangers

it should be supposed that the property was unbequeathed or became vacant, then in this case and at the death of said Laboy the said estate was to be transmitted to appellee.

We understand the testator to state two distinct conditions under which the estate passed to appellee, first, on failure of substitution whenever that occurred; secondly, if by reason of any claim of relatives or strangers the said heirloom became vacant or unbequeathed at the death of Laboy, then the transmission occurred.

Appellant insists that the testator intended for his whole estate to revert to appellee in case Dr. Laboy did not comply with the condition as to naming a substitute, and that this reversion would occur at that time by reason of that contingency, and at no other time. That Laboy complied with the condition, named a substitute, and therefore at no future time could the contingency arise or the reversion occur.

This contention is, in our judgment, absolutely unfounded, and is overthrown simply by reading the language of the will. Under the terms of the written instrument the only power Laboy or any successor had was to hold, manage this estate, divide the proceeds equally between himself and appellee, and transmit this possession and power of management and control to a successor through a distinct instrument to be executed at a named time. According to the contention of appellant, Laboy had the power to name his successor, but beyond that the power could not extend.

FOURTH.

The Silva will, as an entirety, is valid, and no part of same void because establishing a perpetuity or creating a fidei commissum.

At page 25 of appellant's brief the argument is presented that the will of Silva is valid except as to the condition regarding substitution and successorship; that there was a prohibition of alienation imposed upon all the successive heirs under said will in perpetuity, which prohibition is void and must fall.

It is not necessary to enter into a discussion of what in fact constitutes a *fidei commissum* in civil law. This has been fully considered by this court in the case of McDonogh's Executor *vs.* Murdoch, 15 Howard, 367.

The Spanish decisions hereafter quoted draw a distinction between trusts established for a family and for a charity, between an effort to prevent alienation of property for the resulting benefit and protection of descendants, and for the benefit of the poor. The Roca case, referred to by the court below in its opinion, and other decisions of the Spanish courts sustain every contention of appellee as to the validity of this will, and especially with regard to its right of succession to the estate upon the failure of the second trustee, the widow of Dr. Laboy, to comply with the terms of the written instrument with regard to naming her own successor.

> "Mr. Vincente Roca devised a large estate in favor of the sick poor domiciled in Badalona, and appointed, as administrators of the property the parish priest and vicar, both present and

future, and the heir of the home named Roses, who were to devote the proceeds thereof to the pious purposes to which they were intended. The heirs of Mr. Vincente Roca contested the legacy, alleging that it constituted an unlawful entail, and petitioned the court to order the administrators to restore the estate to them. This was denied in two instances. An appeal was taken in the second instance and again denied by the Supreme Court, which held that,

> "'Whereas, the essential character of the entailment of property consists in the absolute prohibition of its alienation, and that this condition, being contrary to the natural liberty of contracting, it cannot be presumed, and can only be accepted in cases in which it has been clearly established:
>
> "'Whereas, the mortmains which the law of Oct. 11, 1820, has rendered incapable of acquiring all classes of property, are the lay or permanent ecclesiastical establishments, which according to their by-laws and regulations cannot dispose the ownership of their property, and whereas, the legacy in favor of the sick poor * * * and their families, does not prohibit the alienation of the property devised, and not having been declared in favor of any mortmain, previously established, or created in the will, although persons having a certain calling are named as administrators of said property both in the present and future; it is evident that no entail has been established or amortozation of those prohibited in the law #12, title XVII, book 10, of the New Recop, and in the law of Oct. 11, 1820. "Court 1, Sentence, of Dec. 29, 1886.—Reported in the Official Gazette May 16, 1887, page 117.)'

"The same doctrine will be found in an opinion rendered November 3, 1890 (Official Gazette, Jan. 24, 1891), which expressly refers to that of Dec. 29, 1886.

"Neither the law of Oct. 11, 1820, nor any other law, prohibits an annual and perpetual legacy to be made in favor of a charitable institution, provided that in the form of such legacy, no direct or indirect amortization of property is made, or its circulation prohibited. And even when, in order to satisfy such legacy, it will be necessary to encumber part of the property, charitable institutions are authorized by the law of May 1, 1855, which has modified essentially articles 14, 15 and 16 of the law of Oct. 11, 1820, to accept or acquire real property, even upon condition of investing the entire proceeds derived from the sale of said property into public securities. Any opinion which declares such legacy void, is in contravention of law 28, title IX Partida 6, and the jurisprudence established by the Supreme Court which maintains the stability of institutions of a charitable character which have not been created for the benefit of certain persons or families.

"The same doctrine relating to the acquisition of property by charitable institutions is expressed in an opinion rendered Dec. 27, 1879 (Official Gazette, Feb. 7, 1880), also, Feb. 13, 1880 (Official Gazette, April 5), and Oct. 15, 1880 (Official Gazette, Oct. 30, *idem.*).

> "'45. Charitable institutions which cannot be considered as having been created in favor of a family (familiares) and to which, therefore, the law of 1820 is not applicable.'

"Such charitable institutions in which no special family or persons are called to participate in the object of their creation, cannot be considered as family institutions (fundaciones familiares) nor are the provisions of the law of Oct. 11, 1820, applicable in this case, in as much as said law does not refer to other institutions but to those really relating to families or persons. (Opinion of Oct. 10, 1868, reported in the Official Gazette, Feb. 26, 1869; also Dec. 9, 1880, reported Official Gazette, Dec. 23, 1880.)

"An institution in which strangers or persons not related to the family of the founder, or to that designated by the latter as of lineage, are called to participate in its property or income; is not to be termed a family institution, even though those claiming relationship are asked to participate, and are given preference; as this fact does not alter the character of the institution, as it has been repeatedly held by the Supreme Court. (Opinion July 5, 1875. Official Gazette Sept. 4, 1875.)

"The same is held in an opinion rendered on Jan. 20, 1880 (Official Gazette, Mar. 15), and Sept. 20, 1880 (Official Gazette, Oct. 19).

"The same is true of an institution for the endowment of orphans, even though preference may be given to the feminine lineal descendants of the founder. (Opinion, Dec. 31, 1887, reported Off. Gaz. April 16, 1888.)

"An institution not having a family character is not governed by the law of Oct. 11, 1820. (Op., *supra,* quoted, also, Feb. 9, 1889, Off. Gaz. June 3 and 4.)

> "'46. What *fidei commissa* are prohibitted by the law of 1820.'

"The provisions of article 1, of the law of

Oct. 11, 1820, abolishing all rights of primogeniture, *fidei commissa*, and all other species of entail, do not refer to temporary and alienable *fidei commissa*, but those in perpetuity, the alienation of which is prohibited. (Opinion, April 22, 1865, May 29, 1866, Dec. 21, 1867.)

"Temporary and not perpetual *fidei commissa* are considered those which are limited to a special generation, more so, when no provision is attached restraining their alienation." (Op., April 21, 1886.)

Martinez-Alcubilla "Diccionario de la Administracion Espanola," vol. 7, pp. 1013-1014.

The whole trend of Spanish decisions is to sustain these gifts to charities, and never to presume the prohibition of alienation.

Referring again to the fact that the laws of 1820 were modified by the laws of 1837 and 1855, we quote again from Alcubilla, vol. 7, pages 829-830:

"Opinion of Feb. 23, 1857.—The prohibition in articles 15 and 16 of the law of Oct. 11, 1820, to acquire immovable property, or hold or impose any encumbrance on same, applies only to corporations and establishments known as mortmains, but it does not extend to legacies or donations of the proceeds from the properties.

"In an opinion rendered Dec. 28, 1861, overruling a motion to set aside a judgment of the Court of Valencia, holding that the General Hospital in that city possessed the power of inheritance, the following doctrine was established:

" '1st. That the three instances when foreign heirs are able to inherit in accord-

ance with the provisions of the law 22, title 3 of Partida 6, are at the time of the execution of the will, at the death of the testator, and when the parties named in the will are *declared to be the heirs:*

" '2d. That the Valencia Hospital had the capacity of receiving the inheritance of Mrs. Vicenta Ibanez, when she made the will (Jan. 23, 1828), and when she died (Feb. 27, 1830) and when to give effect to its provisions, said hospital came into possession of the property:

" '3d. That, supposing the third or *temporal* instance referred to in the law cited, to be that in which said hospital came into the actual possession of the inheritance, it held at that time, July, 1858, the necessary power to inherit by virtue of the law of May 1, 1855, expressly authorizing charitable institutions to receive and acquire real property, with the condition, however, of converting the same into public securities.

" '4th. That the judgment of the Court of the First Instance of Valencia, was not against the law cited, nor that of Sept. 27, or even that of Oct. 11, 1820, as articles 1 15 and 16 of this latter law were essentially modified by that of May 1, 1855, already referred to, and by other provisions, and

" '5th. That in the opinions rendered by this supreme tribunal (Oct. 7, 1852, and July 26, 1854), and the doctrine therein expressed which it is alleged has been violated, were written before the enactment of the law of May 1st, as the dates indicate, and that in the first case the charitable establishments benefited by the legacy were capable

of inheriting not only under the third instance designated by the Partida law, but under the first and second as well.'

"Opinion April 13, 1863.—Court No. 3 of Oyer and Terminer of Barcelona in a judgment rendered on Feb. 16, 1861, refused a petition to annul a legacy of real property made by Don Jose Fernandez on July 27, 1839, in favor of an hospital and two charitable institutions of said city. An appeal to reverse was not entertained by the Supreme Court which confirmed its previous important decisions, saying that:

"'Although the law of Oct. 11, 1820, reestablished by the law of 1856, prohibited mortmains from acquiring real estate or immovables; articles 14, 15 and 16 of said law were essentially modified by that of May 1, 1855, which expressly authorized charitable institutions to acquire real property, although upon condition of investing the entire proceeds of the sale into public securities:

"'That, by virtue of the provisions of said law, the hospital of Santa Cruz de Barcelona, and the two institutions known as the homes of Mercy and for Orphan Children, were capable of receiving and acquiring the proceeds of sale, of the property devised to them by Don Jose Jaumandreu? (Fernandez) on July 27, 1839, upon condition as aforesaid.'

"Opinion April 30, 1866.—Dona Maria Vaamonde left two houses, the one to a certain person, and the other to the congregation of Neustra Senora de los Dolores, after the death of her husband, whom she named her heir and who was to enjoy the income therefrom during life.

"The husband contracted a second marriage; and upon his death he constituted as his absolute heir his wife Dona Adelaida Osendo, who, supported by articles 15 and 16 of the law of October 11, 1820, filed a suit against the congregation asking that the legacy be declared void, and that the house left to it be merged in the general inheritance. The case was twice decided against her, and a request for an appeal to reverse on the ground that the laws have no retroactive effect, and that the decisions were contrary to the law cited, #22, title III and #1, title IX Partida (Laws of Castile, compiled by King Alphonse the tenth), was denied by the Supreme Court, which declared that:

> "'Whereas the death of the aforementioned Lago, occurred on August 8, 1863, when the law of May 1, 1855, which essentially modified that of October 11, 1820, was in force, the provisions of that law are applicable to this case, which provisions far from declaring the corporations called mortmains incapable of acquiring property, among which the one in question is also mentioned, as per article 1 of said law, they definitely state in article 26, that in future said corporations may accept in accordance with the laws in force, legacies and donations without any other restriction except that of disposing of the property left and donated, as soon as same is declared to be owned by the corporation.'"
>
> Martinez Aleubilla "Diccionario de la administration Espanola," vol. 7, pp. 829-830.

From these authorities it seems abundantly clear that a charitable institution such as appellee could take property directly or as a beneficiary under a trust created in its favor.

In the Roca case the parish priest and the vicar, both present and future, and the heir of a certain named home, were appointed administrators of the property, and were to devote its proceeds to the sick poor. Under the Roca will, as a priest or vicar died, or was transferred, his successor became a trustee of the fund, while under the will at bar each trustee named his own successor.

In both of these cases property was to be held and administered for the benefit of the poor sick, and in neither case was there absolute prohibition against alienation.

But if the contention of counsel for appellant be true, that the will of Silva attempted to establish a *fidei commissum*, perpetual in character, and that this clause of the will is void, and therefore that Dr. Laboy acquired the legal title to the estate with a right to dispose of the property by any act *inter vivos* or *mortis causa*, excepting the beneficial interest of the complainant to one-half the net profits which was a right attached to the land, yet how does this aid the appellant Martinez? Dr. Laboy did not dispose of this estate as the owner of the legal title, but did in accordance with the provisions of the Silva will. If by reason of the condition relative to the appointment of his successors he became absolute owner of the property, then at his death it passed to his heirs, forced or otherwise, and is there any proof in this record that in any

way appellant can claim title to this property as an heir at law of Dr. Laboy? She claimed it distinctly under the provisions of the Silva will, through a successor to Dr. Laboy, the first trustee, and she has held it subject to the provisions of that will.

In its opinion and statement of fact, the court below said, at pages 32-33 of the record:

> "That said Jose Laboy immediately upon the death of his said foster mother, went into possession of the estate and managed it up to the time of his death, which occurred on the 13th day of November, 1903, and after taking possession of it, executed on the fourth day of October, 1893, a public document called a 'Substitution of Heirship,' wherein he recited that having taken possession of said estate, *under the provisions of the Silva will* after the death of his foster mother, he must comply with the provision of the will of Silva in the appointment of his own successor, and for that purpose named his wife, the present respondent Josefa Diana y Martinez, and attempted to confer upon her the powers which he claimed had been conferred upon himself by his foster father, Juan Apolinario Laboy, having made him alternative under the Silva will; and thereafter, just before the time of his death in 1903, he, the said Jose Laboy, made his own will and in it, after reciting the facts, attempted to ratify his act in substituting his wife as the trustee or manager under the Silva will.
>
> "That upon the death of her said husband, Jose Laboy, as aforesaid, his said wife, this respondent Josefa Diana y Martinez, claiming to act under the public document and will so

executed by her husband, took possession of the said estate and has so continued up to the present time."

So that counsel, in presenting the argument that the provision as to the appointment of a successor was void originally, and that the first Laboy "took the estate without any such void and illegal obligation," is destroying the only legal ground upon which appellant can claim the right to hold this property. We insist that she has no such legal right, not because any portion of the Silva will was void, but because the widow of Dr. Laboy failed absolutely to comply with its provisions in naming a successor, and that the taking of this property by Jose Laboy and the holding of it by him, and by the appellant, was without warrant, and that the title had been vested in appellee from 1891, the date of the death of Dr. Laboy's widow.

FIFTH.

Appellee is not barred by lapse of time from prosecuting this cause, or estopped by any conduct or acts of itself.

This is a suit in equity and not at law. It involves questions connected with violation and breach of a trust—a trust either direct and expressed under the will of Silva, or a trust implied, and arising from the action of the parties themselves.

In discussing the effect of the statute of limitations this court, speaking through Mr. Chief Justice Fuller, said in the case of Riddle *vs.* Whitehill, 135 U. S., at page 635:

> "Courts of equity sometimes act in obedience to the statute, and sometimes apply it by way of analogy. Where the cause of action is legal and the statute has barred the remedy at law, the defense is as complete in equity as at law, but where the case falls within the proper, peculiar and exclusive jurisdiction of a court of equity the statute is not necessarily applied."

Again, in Speidel *vs.* Henrici, 120 U. S., at pages 386, 387, this court, speaking through Mr. Justice Gray, said:

> "As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*. (Cases cited.)
>
> "But this is, in accordance with the reason on which it is founded, and as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification, that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust;* as when, for instance, such transactions take place between the trustee and the *cestui que trust* as would in case of tenants in common amount to an ouster of one of them by the other. (Cases cited.) This qualification has been often recognized in the opinions of this court, and distinctly affirmed by its latest judgment upon the subject. (Cases cited.)
>
> "In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time

> is as complete a bar in equity as at law. (Cases cited.) In such a case, Chief Justice Marshall repeated and approved the statement of Sir Thomas Plumber, M. R., in a most important case in which his decision was affirmed by the House of Lords, that 'both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must within that period have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if, during all that period, the possession has been under a claim unequivocally, adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor.' "

From January 15, 1891, the date claimed by counsel for appellant as the beginning of the adverse possession, until within a year before this suit was filed, the Silva will and the rights of appellee under that will were recognized both by Jose Laboy and appellant Martinez. The possession of Laboy and appellee was claimed under this will, and every lease made and delivered by them referred to the Silva will and incorporated parts of it in the written instrument. But even if, in a case such as this, the court would consider a plea of the statute of limitations, advanced by one who, holding a trust attitude, has violated every provision of the trust and attempted to gather to herself rights and properties belonging to the beneficiary, yet we insist that the statute of limitations applicable in this

case would not stand as a bar, even in a common-law action.

Walton's translation of the Spanish Civil Code provides, article 1963:

> "Real actions, in respect to real property are prescribed after thirty years.
>
> "This provision is understood without prejudice to what is provided in respect to the acquisition of ownership or of real rights by prescription."

Section 1959, same Code, provides:

> "Ownership and other real rights in respect to real property shall also be prescribed by the uninterrupted possession of the same for thirty years, without the necessity of title or good faith, and without distinction of persons, absent or present, save the exception set forth in art. 539." (This article refers to easements.)

The Revised Code of Porto Rico, 1902, at section 1869, provides:

> "Ownership and other property rights in real property shall also prescribe by uninterrupted possession of the same for thirty years, without the necessity of title nor good faith, and without distinction between present and absent persons with the exception mentioned in section 546 of the second article, chapter 1, title VII, of the 2nd book of this Code."

Section 1957, Walton's Code, is as follows:

> "Ownership and other real rights in respect to real property shall be prescribed by possession for ten years as to persons present, and

> by twenty years in respect to those absent, *when held in good faith and under a just title.*"

Section 1858 of the Code of 1902 re-enacts this section. So that the law stands today barring a suit to recover real estate, if not prosecuted within thirty years, and confirming title to real estate in a person who has held it for ten years, as against those present, when the holding *is in good faith and under a just title.*

Section 1959, Walton's Code, provides:

> "Ownership and other real rights in respect to real property shall also be prescribed by the uninterrupted possession of the same for thirty years, without the necessity of title or good faith, and without distinction of persons, absent or present, save the exception set forth in art. 539."

Appellant cannot claim uninterrupted possession for thirty years. She claims from 1891 to 1904. Her claim, therefore, must rest upon possession for ten years, held in good faith and under a just title. She has been holding absolutely without title, with the tacit consent, it is true, of the appellee, for a portion of the time, but her own acts show that the holding was not in good faith, and the suit was instituted as soon as the vicious conduct of the appellant became known to appellee.

According to brief of counsel for appellant, she had no title of any character. If she could not hold as a successor, if that provision of the will were void, then she was absolutely without title or without color of title.

We insist that the doctrine of estoppel has no place in the case at bar; that the leases that were considered by the court and held null and void were leases in which the extensions had been made without the knowledge, consent, or ratification of appellee. These leases were made at ridiculously low prices, and the portion due appellee collected in advance.

In the statement of fact made by the court (Rec., p. 55) it appears that one of the lessees, the appellant Chardon, voluntarily came into court and agreed to an increase of his rental from $240 a year to $1,350. This statement shows that while large portions of these lands were worth a yearly rental of $6 to $12 per acre, and even more, that some of the leases and extensions were made for less than a dollar an acre. The parties themselves were before the court, all the leases and facts were considered by the court, and by reason of the frauds permeating these leases, the smallness of the consideration for them, and other facts and circumstances, the court declared them void. It is impossible to believe that these extensions could have been agreed upon between Laboy and his widow, the appellant, and the lessees, without the fraudulent purposes of appellant being known to her co-appellants.

CONCLUSION.

The appellant is not in court with clean hands. She has violated every duty due to appellee. She has destroyed the earning capacity of the estate, and refused even to deliver over to the appellee its portion of these decreased earnings. She has attempted to secure by

ex parte proceedings a possessory title and then a dominion title to the lands; she has no legal right to the possession under the will of Silva, the line of succession having failed at the death of Dr. Laboy's widow in 1891, and we ask that the true owner of this estate, the appellee, be protected in its rights and through it the bounty of Silva pass to the poor sick of his district, and that the decree of the court below be affirmed.

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Of Counsel.

MARTINEZ *v.* LA ASOCIACION DE SENORAS DAMAS DEL SANTO ASILO DE PONCE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 83. Argued January 21, 1909.—Decided February 23, 1909.

All relations between Spain and Porto Rico having been severed by the cession of that Territory by the Treaty of Paris, a corporation organized under the laws of Spain for purely local and charitable purposes in Porto Rico is not to be regarded as a citizen of Spain within the meaning of the provisions of the act of April 12, 1900, c. 191, 31 Stat. 77, as amended by the act of March 2, 1901, c. 812, 31 Stat. 953, relating to the jurisdiction of the District Court of the United States for Porto Rico, nor is such a corporation a citizen of the United States within the meaning of such provision; if it is a citizen of any country it is a citizen of Porto Rico.

The people of Porto Rico have been created by Congress and exist as a body politic subject only to the usual reserved power of annulment of territorial legislation; and the government of Porto Rico under the organic act is charged with the creation and control of corporations strictly local in character, and corporations of that nature organized prior to the cession of the island are to be regarded for jurisdictional purposes as citizens of Porto Rico.

While by Article IX of the Treaty of Paris between Spain and the United States provision is made for Spanish subjects, natives of the peninsula, to preserve their allegiance to Spain, that article has no reference to corporations; nor is there any other provision of the treaty providing therefor. *Quære* and not decided, what the citizenship now is of Spanish corporations doing business in Porto Rico prior to its cession by the Treaty of Paris to the United States.

THE facts are stated in the opinion.

Mr. Fritz von Briesen, with whom *Mr. Charles M. Boerman* was on the brief, for appellants.

Mr. John W. Yerkes, with whom *Mr. George E. Hamilton,*

Mr. M. J. Colbert and *Mr. John J. Hamilton* were on the brief, for appellee.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellee, alleging itself to be "a charitable corporation, organized and existing under the laws of the Kingdom of Spain," brought a bill in equity in the District Court of the United States for Porto Rico against the appellants, alleging them to be citizens of Porto Rico. The object of the suit, generally described, is to assert title to certain lands in Porto Rico, and its determination turns upon the construction of the will of Juan Bautisti Silva, an inhabitant of Porto Rico, who died in 1875. The suit, therefore, does not arise under the Constitution, laws or a tre .ty of the United States. A decree was entered in favor of the plaintiff, and the defendants appealed to this court.

Before entering upon a consideration of the merits of the cause the jurisdiction of the court below to entertain it, which is questioned, must be passed upon. The District Court of the United States for Porto Rico was created, and its jurisdiction defined, by the act of April 12, 1900, establishing a civil government for Porto Rico, 31 Stat. 77, chapter 191, as amended by the act of March 2, 1901, 31 Stat. 953, chapter 812. By § 34 of the first act it was provided that—

"Porto Rico shall constitute a judicial district to be called the District of Porto Rico, . . . the District Court for said district shall be called the District Court of the United States for Porto Rico . . . and shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court."

The jurisdiction was further defined in § 3 of the last act, which provided that "the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition

to that conferred by the act of April 12, 1900, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

If the court below had jurisdiction, it must be under the amending act and because the plaintiff was either a citizen of the United States or a citizen or subject of a foreign state. No other ground of jurisdiction has been or can be suggested. It was found by the District Court that the plaintiff was a citizen or subject of Spain and the jurisdiction was sustained upon that theory. Counsel in this court have attempted to sustain the jurisdiction on the ground that the plaintiff, if not a citizen or subject of Spain, is a citizen of the United States. If the plaintiff was neither a citizen of the United States, nor a citizen or subject of Spain, it is clear that the court was without jurisdiction.

We assume, in favor of the plaintiff, that it was a corporation organized in 1863 by a decree of the Spanish Crown. That decree incorporated an asylum of charity in Ponce. The purposes of the incorporation are described in article 1 of the by-laws, which follows;

"This association recognizes as its principal object the alleviation of human suffering, and for this purpose it will establish an asylum for the poor of the district When its resources permit it to give its attention to other objects related to its purpose it will establish schools for poor children of both sexes, under the supervision of Sisters of Charity."

The incorporators were all residents of Ponce, and all the purposes of the corporation were to be accomplished and all its business done in that locality.

The first question is, whether, after the ratification of the treaty of peace between the United States and Spain, the plaintiff corporation continued to be a citizen or subject of Spain.

It is assumed, in passing upon this question, that Congress

in employing the word citizen in this connection intended to include corporations, in view of the decisions of this court that the word has that meaning when used in the definition of the jurisdiction of the Circuit Courts of the United States. *St. Louis & San Francisco Railway* v. *James*, 161 U. S. 545.

By the treaty of peace (30 Stat. 1754), Spain ceded Porto Rico to the United States and thereby parted with all sovereignty over that island. Careful provision was made that the cession should not impair the property or rights of corporations, associations or individuals. Article VIII. It is clear, however, that thereafter the duty to protect property and rights within the ceded territory rested upon the United States. An opportunity was afforded to Spanish subjects, natives of the peninsula, to preserve their allegiance to the crown of Spain by making within a limited time a declaration to that effect. Article IX. This article obviously had no reference to corporations. No other provisions of the treaty seem relevant to the question before us.

We are of opinion that the cession of Porto Rico by Spain to the United States severed all relations between Spain and this corporation, and that thereafter it cannot be regarded in any sense as a citizen or subject of Spain. Spain has no duty to or power over it. We confine this statement to a corporation like the one before us, formed for charitable purposes and limited in its operations to the ceded territory. A different question (which need not be decided) would be presented if the corporation had other characteristics than those possessed by the one under consideration, as, for instance, if it were a Spanish trading corporation, with a place of business in Spain but doing business by comity in the island of Porto Rico.

The next question is whether the plaintiff corporation is a citizen of the United States. Its status during the period between the cession and the passage of the act to provide a civil government for the island need not be determined. That act created a form of government for Porto Rico and its adjacent islands, in which there was exhibited, with some modifications,

the characteristic American separation of the legislative, executive and judicial powers. The United States has never granted to any territory organized by act of Congress complete self-government, and Porto Rico is no exception to the rule. Indeed, though the act confers a considerable measure of self-government, for reasons deemed sufficient by Congress, it stops short of the power usually conferred upon territories within the continent. This organic act has the provision common to most, if not all, our territories, whether fully incorporated into the United States or not, that Congress may, if it deem advisable, annul all laws enacted by the local legislative assembly. Subject to these limitations, a body politic, under the name of The People of Porto Rico, with a citizenship of its own, is created (§ 7); existing laws, not in conflict with the applicable laws of the United States, are continued in force until altered, amended or repealed by the legislative assembly or by Congress (§ 8); public property acquired by the United States from Spain is placed under the control of the local government, and the legislative assembly is given power to legislate with respect to it (§ 13); the legislative authority is given "power by due enactment to amend, alter, modify or repeal any law or ordinance, civil or criminal, continued in force by this act" (§ 15); the Governor is enjoined faithfully to execute the laws, and given to that end the applicable powers of a Governor of a Territory of the United States (§ 17); the legislative assembly of Porto Rico is constituted (§ 27); and the scope of the legislative power is fully described in § 32, as follows:

"That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights,

and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

In the form of government, which is typically American, the creation and control of corporations is exclusively a legislative function. We are of opinion that the effect of the organic act is to intrust that function, so far as it relates to a corporation of the kind under consideration, whose essential qualities need not be repeated, to the government of Porto Rico; and that such a corporation is now, if a citizen of any country, a citizen of Porto Rico. We need not consider whether the corporation has more than a *de facto* existence, subject to the will of the Porto Rican legislature. It follows that the court below had no jurisdiction of this cause.

The decree is reversed and the cause remanded to the District Court of the United States for Porto Rico, with instructions to dismiss the bill, without prejudice, for want of jurisdiction.

END OF CASE